Λ

TREATISE

OF

EQUITY.

VOL. II.



TREATISE

OF

EQUITY.

WITH THE ADDITION OF

MARGINAL REFERENCES AND NOTES:

By JOHN FONBLANQUE, Esq.

BARRISTER AT LAW.

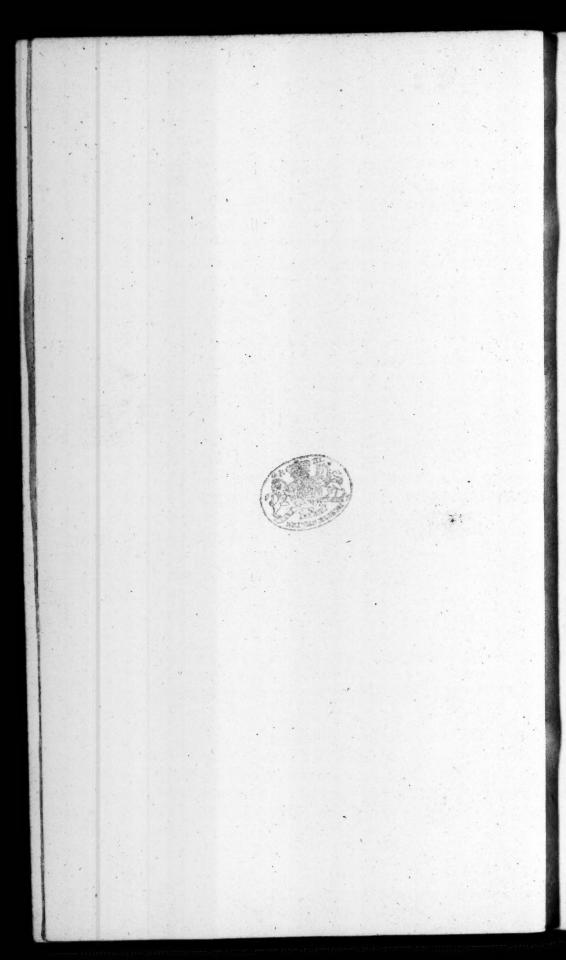
SECOND EDITION, WITH ADDITIONS.

VOLUME THE SECOND.

LONDON:

Printed for W. CLARKE and SON, Portugal-Street, Lincoln's-Inn.
1799.

R. Noble, Printer, Great Shire-Lane.



DESCRIPTION OF HOME IN THE PROBERT

TREATISE

OF

EQUITY.

BOOK THE SECOND.

in our course of equity where site in their burns

Of Uses and Trusts.

CHAP. I.

Their Nature.

SECTION 1.

E will now proceed to some of the particular kinds of Agreements which occur most usually in Chancery. And, 1st, Of a depositum or trust, to which this Court owes its original (a), and

(a) The trust here intended, as it was the origin so it is also the peculiar object of equitable jurisdiction. There are, however, other trusts, which are, and always have been, cognizable in courts of law, as deposits, and all manner of bailments, and especially Vol. II.

fo

m

G

or

uf

an

ha

it

for

pu

alie

and which, if well confidered, will still be found to make the principal business here; for whoever has the possession of goods or lands, either hath the absolute property

that implied trust to account for money received to another's use. See 3 Bla. Com. 432, and Sir Wm. Jones's admirable Effay on the Law of Bailments. With respect to those trusts which are exclusively cognizable in our courts of equity, they are in their nature very fimilar to the fidei commissa of the civil law; and indeed the invention feems to have been borrowed from them; and as the jurifdiction of the prætor was created for the purpose of protecting property fidei commissum, fo were courts of equity erected, or at least their jurisdiction extended, for the purpose of protecting and enforcing the execution of trufts. The history of the prætorian institution is thus described by Justinian: " Sciendum est omnia fidei commissa, primis temporibus, infirma fuiffe; quia nemo invitus cogebatur præstare id de quo rogatus erat : Quibus enim non poterant hæreditatem vel legata relinquere, fi relinquebant, fidei committebant eorum, qui capere ex teftamento poterant, hæreditatem, et ideo fidei commissa appellata funt: quia nullo vinculo juris, sed tantum pudore corum qui rogabantur, continebantur. Postea divus Augustus primus semel iterumque, gratia perfonarum motus, vel quia per ipfius falutem rogatus quis diceretur, aut ob infiguem quorundam perfidiam, justit consulibus auctoritatem suam interponere: quod quia justum videbatur et populare erat, paulatim conversum est in assiduam jurisdictionem : tantusque eorum favor factus est, ut paulatim etiam prætor proprius .

Ch. 1. §1. OF USES AND TRUSTS.

C

n .

d

1,

1-

ne

:

0-

ur

0-

eef-

ffa

m

ea

er-

tus

m,

od

n-

eo-

ro-

us .

property or estate in them, by a sufficient title, or, so far as this is wanting, is considered as a trustee for the true owner. And no man can be deprived of his estate and

prius crearetur, qui de fidei commissis jus diceret, quem fidei commissarium appellabant. Inst. lib. 2. ti. 23. Duplex olim usus sidei commissorum suit unus in morientibus in peregrinatione, ubi fæpe eveniebat, ut teftamentum facere non possent propter penuriam testium civium Romanorum, quæ tes etiam usum codicillorum invexit, alter in gratificandis incapacibus, cum scilicet hæres clam fidem, ut incapaci restitueret, Vinnius 489." Whether a gift or legacy upon trust or in confidence, that the donee or legatee would hand it over to a person by law incapable of taking, is very particularly confidered by Pothier (Traite des Donations, partie 1. chap. 2. art. 3.), and denied to be in conscience an effective and binding trust. Yet to such cause, namely, the incapacity of ecclesiastical bodies to take in mortmain, and the want of legal means to enforce the execution of a trust created for their benefit, may be referred the origin of our equitable fystem. Gilbert's Lex Prætoria, 259. 260: and though the original purpose of this invention of uses or trusts was disappointed by the 15 Richard 2. c. 5. declaring all uses subject to and within the statutes of mortmain, and forfeitable like the lands themselves; " yet the idea having been once introduced, however fraudulently, it afterwards continued to be often innocently, and fometimes very laudably, applied to a number of civil purposes, particularly as it removed the restraint of alienations by will, and permitted the owner of lands,

B 2

and property, but with his consent, or by order of law; as by some contract or conveyance, or by a forfeiture for some crime, or want of claim in due time, or for some other default or negligence in him; and therefore if a man pays money upon a mistake, it not being intended as a gift, the receiver shall take it only in trust for him that paid it (1); and he may recover it back again even at law (b).

(1) Buller's Ni. Pri. 131.

> in his lifetime, to make various defignations of their profits, as prudence or justice, or family convenience, might from time to time require, till at length, during our long wars in France, and the subsequent civil commotions between the Houses of York and Lancaster, uses grew almost universal, through the defire that men had, when their lives were continually in hazard, of providing for their children, and of fecuring their estates from forfeitures, when each of the contending parties, as they became uppermost, alternately attainted the other: Wherefore, about the reign of Edward 4th, (before whose time, Lord Bacon remarks. there are not fix cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system." 2 Bla. Com. 329. Lex Pratoria 259. 260.; but fee Brent's Cafe, 2 Leon. 14, in which the origin of uses is referred to a much earlier period.

(b) The receiving of money, which confidently with conscience cannot be retained, is in equity sufficient

ti

it

fe

C

r

I

y

n

e

it.

eir

e,

ng

vil

ın-

ire

in

ng

on-

ely

of

ks,

the

uce

Bla.

nt's

red

vith ient

to

But if the payment were upon an illegal contract, the law will not encourage such engagements so far, as to help him again to his money; though if it were unlawful only on the part of the receiver, it might

to raise a trust in favour of the party from whom, or on whose account, it was received; but in applying this rule to payments by mistake, it is material to diftinguish mistakes which proceed from ignorance of the law, from those mistakes which are founded on the misapprehension of some fact. With respect to mistakes proceeding from ignorance of law, it is by no means true, that they are univerfally relievable in equity, or in an equitable action at law, as when a man, not knowing that he was discharged from a debt by the statute of limitations, pays the debt; or being bound in honour and conscience to any particular payment, makes such payment; for, in all cases in which money is to be recovered back, merely upon principles of equity, the governing question is, whether the defendant can with a fate conscience, retain what he has received? Farmer v. Arundel, 2 Bla. Rep. 824. Moses v. Macferlan, 2 Burr. 1012. Munt v. Stokes, 4 Term Rep. 561. See also Nichols v. Leeson, 3 Atk. 573. Atwood v. Lamprey, M. 1719, stated in a note 3 P. Will. 127: but if money which there was no ground to claim in conscience be paid on a mistake of fact, it may be recovered back. 2 Burr. 1010. Bize v. Dickfon, 1 Term Rep. 285, except where it is paid into court, in which case it cannot. Malcolm v. Fullarton, 2 Term Rep. 648. See B. 1. c. 2. f. 7.

be otherwise (c). And the same rules may be applied to all other engagements.

(c) The principal distinction in the civil law upon this point, appears, as already observed, B. I. c. 4. § 4, note (y), to have depended upon the turpitude of the contract involving both, or affecting only one of the parties, ubi et dantis, et accipientis turpitudo verfatur, non posse repeti dicimus; quotiens autem solius accipientis turpitudo versatur, repeti posse. The law of England also appears formerly to have confidered all persons, in any manner connected with an illegal contract, excluded from relief, in respect of what he might have paid under it; but as observed by Lord C. Thurlow in Neville v. Wilkinson, 1 Bro. Rep. 547, this rule (See Tomkins v. Barnett, 1 Salk, 22.) has been broken in upon by many decisions. See Wilkinson v. Kitchen, 1 Ld. Raymond. 89. And our courts, in the application of it, have even gone so far as to discriminate the different degrees of guilt; and on the ground of fuch discrimination, have held, that money paid for infuring lottery tickets may be recovered back from the infurer, Jacques v. Golightly, 2 Bla. Rep. 1073. Jacques v. Withy, 1 Bla. T. Rep. 65. But that payments by the infurer in pursuance of his engagement cannot be recovered back, Browning v. Morris, Cowp. 790. Yet in both cases, the whole of the transaction is declared illegal, and prohibited by statute. So in the case of an usurious loan, it is now settled, that the lender may recover back, either in equity, or at law, the excess of interest; for he cannot be considered to be in pari delicto, Bofanquet v. Dashwood, Forrest 38. See also Smith v. Bromley, Dougl. 670. Jones v. Barclay, Dougl. 669. In what cases equity will decree an account of money received in respect of illegal transactions, see Watts v. Brookes, 3 Vez. Jun.

y

on

4,

he

ur,

pi-

ng-

ns,

ex-

ow

ule

en,

ap-

of

for

om

73.

ay-

ent

wp.

n is

the

the

aw,

d to

38.

3ar-

cree egal

SECTION II.

NOW an use is a trust (d), or considence, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate, and to the person concerning the land, viz. that cestuique use should take the profits, and that the terre-tenant should make estates according to his direction, and plead such pleas as he should supply him with, at the costs and expence of the cestuique use: so that the cestuique use had neither jus in re nor ad rem, i. e. neither a

(d) Though an use be properly defined to have been a trust, yet it may be material to observe, that even before the statute of uses, there was a clear and established distinction between uses and trusts, uses being of a permanent and general nature, and trusts being of a special and transitory nature, the one being alienable, the other not: and the one not being capable of being limited on a term, which the other might. This distinction is noticed by Lord Bacon, Readings on Uses, and Chief Baron Gilbert: but is much more particularly pursued and illustrated by Mr. Sanders, in his Essay on the Nature and Laws of Uses and Trusts, to which work I beg to refer the Reader, who may wish for an accurate and historical detail of the origin of uses and trusts.

right in possession, nor in action, but only a confidence and trust which the common law, though it took notice of, would not protect, nor give him any remedy for it; but his remedy was only by subpæna in Chancery (1) (e). And if the feossess would not perform the order of Chancery, then their persons were to be imprisoned

(1) Chudleigh's Cafe, 1 Rep. 121. Co. Litt. 271. b. Delemere's Cafe, Plow. 346. b. See Lord

Bacon's Readings on the Sta. of Uses, 303. Gilbert's Law of Uses and Trusts. Sander's Law of Uses and Trusts. Shepherd's Touchstone, 502. Dr. and Student, Dia. 2. c. 7. Brent's Case, 2 Leon. 14.

(e) It is certainly true, that uses were not protected by courts of common law; the use being at law confidered as repugnant to the limitation to the feoffees, and therefore not entitled to prevail (Gilbert's law of Uses and Trusts, p. 2.); but though they were not allowed to operate at law, they appear to have been particularly protected in equity, and to have been allowed to receive all those various modifications, of which the legal effate itself was capable. Thus an use was held to be descendible, according to the rules of common law, 2 Rolls Ab. 780, Gilb. Uses 16,; or alienable or deviseable, Gilb. Uses 26, 37. But, in such cases, the heir taking by descent, or alience by grant, or the devisee by will, was in the same precarious fituation with respect to the seoffees to uses, as was the original celtuique use; for as to the possession of the land he could not obtain it at law, nor even enter upon it, without the permission of the feoffees, but as a trespasser, 1 Rep. 132. And, as the feosfees had the legal estate, they might at any time disappoint the claim

imprisoned for the breach of the confidence, till they did perform it (2). For Chancery will not suffer a right in conscience to be without a remedy (3); and the first feoffment shall not come in examination, but only whether in conscience the remedy ought not to be performed.

(2) See § 1.
note, Harg.
Law Tracts,
340.
Jones v. Morly,
1 Ld. Raym.
291.
(3) Francis's
Maxims,
Max. 6.

claim of even a bonâ fide purchaser of the use, by conyeying the land for valuable confiderations to persons, without notice of the use to which the land was subject; in which case the alienee would be entitled to hold the land discharged of the use. To check this abuse of confidence, the legislature, at length, interfered, and by 1 Ric. 3, c. 1. empowered the ceftuique use to enter and make a feoffment; but, as the provifions of the statute did not declare the alienation by the feoffees void, they still had the power to alien until the cestuique use had made such disposition of the land as the statute empowered him to make; so that a statute intended principally to protect the bona fide purchaser, became by its abuse an additional means to defraud him; for both the feoffee and the cestuique use having the legal right to alien, they, by several and different feoffments, entangled in dispute and difficulty the different claims derived under them.

f

e

f

,

e e

a e e e m

SECTION III.

(1) L: Bacon's Use of the Law, 153. 2 Bla. Com. 331.

(2) Sander's Ules, 110. Gilb. Ules, 37. (3) Gilb. Ules, 38. Hard. 466. 467, 492, 495. Burgels v. Wheate, 1 Bla. Rep. 123.

RUT these uses proving a great grievance to the kingdom (1), and therefore esteemed odious in the law, they being founded usually in fraud, to evade the statutes of mortmain, or to prevent forfeitures, or the wardship of the heir. or just debts, and the like; for they were accounted in law neither chattel nor hereditament, and were no affets to the executor or heir (2), neither could they be forfeited (3). The statute of 27 H.8. cap. 10. (f), to prevent these inconveniences, hath fince executed the possession

to

(f) Lord Bacon, who appears to have given a more than ordinary degree of attention to the doctrine of uses, observes, that, by this course of putting lands into use, there were many inconveniences, as the practice which originated in a reasonable cause, (viz. to give men power and liberty to dispose of their own), was turned to deceive many of their just and reasonable rights; as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtefy, the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt, the poor tenant of his lease; for the rights and duties were

given

to the use, so that such uses have now the same qualities, as estates at common law, and a rent may be reserved out of them (4). And there shall be a tenancy by the curtesy of such an estate vested, and it shall be assets (5); for the use and possession pass by virtue of the statute both together in one instant, tanquam

(4) 27 H. 8.

(5) Cattle v. Dod, Cro. Jac. 201. 1 And. 275, 338. 2 Bis. Com. 333.

given by law from him that was owner of the land, and none other, which was now the feoffee, of trust, and fo the old owner, which we call the feoffor, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee." Use of the Law, 153. To remedy these inconveniences, various statutes were provided. By 1 H. 6, and 4 H. 8, it was enacted, that actions for the land may be brought against the person taking the profits, who was the cessuique use; by I Rich. 3, leases and estates made by cestuique use are made good; by 4. H. 7, the heir of cestuique use is to be in ward; by 10 H. 8, the lord is declared to have relief upon the death of any cestuique use; and by 19 of H.7. c. 15, the lands of cestuique use are declared to be subject to his creditors. These legislative provisions were, however, insufficient to suppress that variety of frauds to which the practice of conveyances to uses had given rife; but as they all tended to consider the cestuique use as the real owner of the estate, that idea was, at length, carried into full effect by the statute 27 H. 8, usually called the Statute of Uses, which, after reciting the above mennoned inconveniences, which had grown out of the practice

(6) Lutwick v. Mitton, Cro. Jac. 604. Ifeham v. Morrice, Cro. Car. 110. Saffyn's Cafe, 5 Rep. 124. Barker v. Keate, 2 Mod. 252. 2 Vents. 35. Co. Litt. 270, 275. Mr. Butler's Note (2). (7) Gilb. Uses, 230.

uno flatu: and a bargain and sale of an estate for years is capable of release by this statute, and so is the constant practice; which method of conveyance was first devised by Sir Francis Moor (6). Yet actual possession is not in the cestuique use by this statute; neither upon such a seisin can he maintain an action for trespass; for it is impossible an act of parliament should give any more than a civil seisin (7). And Mr. Noy was of opinion, that this conveyance by lease and release (g) could never be maintained, without the

practice of conveying to uses, enacts, that when any person shall be feized of lands, &c. to the use, considence, or trust of any other person or body politic, the person or corporation entitled to the use in see simple, see tail, for life, or for years, or otherwise, shall henceforth stand, or be seized or possessed of the land, &c. of and in the like estates as they have in the use, trust, or considence; and that the estates of the person so seized to uses, shall be deemed to be in him or them that have the use, in such quality, manner, form, or condition, as they had before in the use.

(g) "The form of conveyance by lease and release is originally derived from the common law. It is necessary, therefore, to distinguish in what respects it operates as a common law conveyance, and in what it operates under the statute of uses. At common law.

the actual entry of the lesse, as the ancient course was (8): and in the case of a com-

(8) Barker v. Keate, 2 Mod. 252.

law, when the usual mode of conveyance was by feoffment, with livery of feifin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner, as by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate, for the express and sole purpose of conveying the reversion, and then by a surrender of the release either of the particular estate to the reverfioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderce or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for years; for, at the common law, the ceremony of feifin is as necessary to create an estate of freehold, as it is to create an estate of inheritance; still an actual entry would be necessary on the part of the particular tenant; for without actual possession the leffee is not capable of a release operating by way of enlargement. But this necessity of entry for the purpose of obtaining the possession was superfeded or made unnecessary by the statute of uses; for by that statute the possession was immediately transferred to the cestuique use; so that a bargainee under that staa common law lease, this may, perhaps, be true, for the estates are not divided till then, and so no privity (9).

(9) Saffyn's ti Cafe, 5' Rep 124. b. Litt. § 459.

> tute is as much in possession, and as much capable of a release before or without entry, as a leffee is at common law after entry. All, therefore, that remained to be done, to avoid, on the one hand, the neceffity of livery of seisin from the grantor, and to avoid, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate, (which, for the reasons above mentioned. should be an estate for years,) should be so framed as to be a bargain and fale within the statute. Originally it was made in fuch a manner, as to be both a leafe at the common law, and a bargain and fale within the statute. But, as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, (See Ld. Altham v. E. of Anglesey, Gilb. Rep. 17.) it became the practice to infert among the operative words, the words Bargain and Sale: in fact it is more accurate to infert no other operative words, and to express that the bargain and fale, or leafe, is made to the intent and purpose, that thereby, and by the statute of uses, the lessee may be capable of a release. The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee is in possession by the statute." Mr. Butler's Note, Co. Litt. 275, b. 276, a. See also Mr. Sanders on Uses and Trusts, p. 96, 394, and Shepherd's Touchstone, ch. 10, where this mode of conveyance is confidered.

SECTION IV.

YET, notwithstanding this statute, there are three ways of creating an use or a trust, which still remains a creature of the court of equity (b), and subject,

(b) The legislature, by the statute 27 H. 8. c. 16, is thought by Lord Coke (1 Rep. 125.) to have intended to abolish uses and trusts. But see Lord Bacon's Readings on the statute. If such was the intention, courts of law, by too first a construction of its provisions, defeated it, and rendered it necessary for courts of equity to retain that jurisdiction, of which a more liberal interpretation of the flatute by courts of law would probably have deprived them; fo that, as Lord Hardwicke observes, " A statute made upon great confideration, introduced, in a folemn and pompous manner, by a strict construction, has had no other effect than to add at most three words to a conveyance." Hopkins v. Hopkins (1 Atk. 591.) Courts of equity, in the exercise of this jurisdiction, have, however, wifely avoided, in a great degree, those mifchiefs which made uses intolerable. They now confider a trust estate (either when expressly declared or refulting by necessary implication), as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, except dower, (and confequence, except escheat) to which the other is subject in law: and by a long feries of uniform determinations for now near a century past, with some affistance from the legislature,

(1) Sympson v. Turner, 1 Eq. Ca. Ab. 383, Marg.

(2) Dyer, 369, a. Moor. 614. Shepherd's Touchstone, 506, 507.

(3) Ld. Bacon's Readings on St. of Ufes. 334, 335.

(4) Dyer, 155. Chudleigh's Cafe, 1 Rep. 136. b. 1 Atk. 591. See Ash v. Gallen, Ch. Ca. 114, 115.

ject only to their controll and direction (1). 1st, Where a man seized in see, raises a term for years, and limits it in trust for A. &c. for this the statute cannot execute, the termor not being feized (2). And the law is the fame of annuities and personal chattels; for the statute intended to remit the common law, and chattels might ever (i) pass by testament or parol only. And the word (Person) excludes all dead uses, which are not to bodies living and natural (3). 2dly, Where lands are limited to the use of A. in trust, to permit B. to receive the rents and profits; for the statute can only execute the first use. And the common law rejected the fecond use as void; but Chancery confidered the intent of the conveyance (4). 3dly, Where lands are limited to trustees to receive, and pay over the rents and profits to fuch and fuch perfons; for here the lands must remain in

ture, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds, 2 Bla. Com. 337.

(i) Since the statute of frauds, s. 3. real chattels, as a leafe, will not pass by parol; but see 3 Salk. 312.

them

them to answer these purposes (5); otherwise they would be the trustees, contrary to the express words of the will, or other conveyance.

(5) Nevil v.
Sanders,
1 Vein. 415.
Symfon v. Turner, 1 Eq. Ca.
Ab. 383.
South v. Allen,
1 Salk. 228.

Jones v. Lord Say & Seale, 1 Eq. Ca. Ab. 383. 3 Bro. P. C. 458. Shapland v. Smith, 1 Bro. Ch. Rep. 75. Sylvester v. Wilson, 2 Term Rep. 444.

SECTION V.

AND the statute did no more, in executing the possession to the use in the same plight as he had the use (1), than equity would have done before: so that uses are raised by the same conveyances and agreements, as before the statute (2). And, at common law, they being a creature of equity, that is, only an equitable right or conscience, and no possession, are guided entirely by the rules of equity (3), and not subject to the rules of common law (k), though in a deed. For the operation of the statute is, by bringing

(1) Co. Litt. 22. b.

(2) Shepherd's Touchstone, 507. Sanders on Uses, 154, 155.

(3) Ld. Bacon's Reading, 324. Gilbert's Ules, 102.

(k) By the operation of the statute, such uses as are within it become legal estates; but there are some Vol. II.

(4) Ld. Bacon's Readings, 326.

(5) Chudleigh's Case, 1 Rep.

ing the possession to the use, and not the use to the possession (4). So that although, after they are executed by the statute, uses seem not to differ from the possession; yet before they are governed by equity (5), and the not regarding this, but striving to construe them by the strict rules of common law, was the cause of many erroneous opinions, both before and after the statute.

instances in which, in the construction of uses, courts of law will, in the advancement of the convenience of which the modification of estates by way of use has been found productive, depart from the strict rules of the common law. See Gilb. Uses, 77. Sanders Uses, 170. With respect to such uses as are not executed by the statute, but remain folely cognizable in equity, it has been held in some cases. that they are not to be construed by the rules of law, but are to receive a more liberal construction, in favour of the intent; and, in other cases, it has been determined, that the construction of limitations of trust estates must be the same as the construction of similar limitations of legal estates; and that in the construction of both trust and legal estates, the intention is equally to be attended to. I have already had occafion (See B. 1. c. 6. f. 7, 8.) to observe upon the different decifions relating to this point, and shall, therefore, confine my present observations to what I conceive to be the refult of the cases upon it. That in the construction of wills or of deeds, without reference to, and not liable to be affected by previous articles,

articles, the construction of trust estates is the same as the construction of legal estates, provided such trust be not purely executory, in which case, I conceive, courts of equity have a much wider range for the purpose of effectuating the intent, than they have in the construction of trusts particularly drawn out by the author of the trust.

C 2

CHAP. II.

Of the Greation of Uses.

SECTION I.

(1) Co. Litt. 271. b. Gilb. Uses, 75.

(2) Gilb. Uses; 82. Plowd. 302. NOW an use at common law might be created two ways. 1st, By the intent of the parties upon transmutation of the possession (1). Or, 2dly, By an agreement made upon an effectual consideration (a), without transmutation of possession (2). The intent, upon transmutation of the possession, might be declared by writing, or by parol (b). For the use was there according to the intent,

- (a) Uses which pass by transmutation of possession, are raised by seossiment, sine, or recovery, Gilb. on Uses, p. 75; and also by lease and release, Lloyd v. Spillet, Barnard. 384. Uses raised without transmutation of possession, are raised either by way of bargain and sale enrolled, in consideration of money, or by way of covenant, to stand seised in consideration of blood. Gilb. Uses, 82.
- (b) Whether an use could in any case be raised at common law by parol, or even by writing without seal, seems to have been formerly very much doubted, Hore v. Dix, Siders. 26. Dyer, 296. b. Berries v. Bowyer,

manifested (3), since an use is but a trust, which is not like land, for land cannot pass without livery; but an use one may give or devise (c) at his pleasure by nude parol,

(3' Jones v. Morley, 1 Salk. 677. Shower's Perl. Ca. 145.

Bowyer, 2 Show. 158. Chief Baron Gilbert has, however, extracted from the different cases the diftinction, which being constantly kept in view, will, in fome degree, reconcile their apparent contrariety. " At common law," fays he, " an use might have been raifed by word upon a conveyance that paffed the possession by some solemn act, as a seoffment; but where there was no fuch act, there it feems a deed declaratory of the uses was necessary; for as a feoffment which passed the estate might be made at common law by parol, fo, by the fame reason, might the uses of the estate be declared by parol; but where a deed was requifite to the passing of the estate itself, it feems it was necessary for the declaration of the uses: therefore a man could not covenant to fland feised to an use without a deed, there being no folemn act." Gilb. Uses, 270, 271, 48-57. Collard v. Collard, Poph. 47. Moor, 688. Shep. Touchstone, 519. Shortridge v. Lamplugh, 7 Mod. 71. 1 Salk. 678.

(c) At common law, lands (except by special custom) were not devisable; but, by the invention of uses, they were before the statute of uses effectively, though not directly, made so; for by seoffment to such uses as the seoffor should by his last will declare, he might arrange and modify the succession to the profits

(4) Chudleigh's Cafe, 1 Rep. 121. b. Wright's Tenures, 174.

(5) Lord Bacon's Use of the Law. 152.

(6) Pybus v. Mitford, 1 Ventr. 372.

(7) Shepherd's tame perion
Touchstone,
501.
Co. Litt. 23.
Perkins, § 533.
2 Roll.
Ab. 789. Dyer, 146. b. Gilb. Ufes, 222.

parol, for a devise is as a gift (4). And so the practice was before the statute of wills, to put their lands in use, that they might pass without livery (5); and the limitation of the uses was to be by him who had the estate in the land accordding to his intent (6). For if no intent was expressed, nor consideration effectual implied (d), the use arose to the same person who gave the estate (7), and the use ensued the ownership of the land,

profits of the land, and equity would enforce the performance of the trust, Wright's Tenures, 174; and such trust, or uses more strictly speaking, might be limited by a nuncupative will. Chudleigh's Case, 1 Rep. 124.

(d) In Dyer, 146. b. a distinction is taken upon this point between seoffments of which the uses were not declared, nor consideration effectual implied, before the statute of quia emptores terrarum and seoffments after the statute; seoffments before the statute being held in such case to raise an use to the seoffee, in respect of the tenure which might then have substitute having taken away such tenure, the seoffment was conceived to be wholly wanting of consideration, and therefore should be to the use of the seoffor. This distinction is, however, rejected by Lord Bacon, who is of opinion, "That the intendment of an use to the seoffor,

land, without having regard to estoppels, which are adverse to truth and equity: for the conveyance standing indifferent, the Chancery thought it best to put the proof upon him who took the possession, and if he failed, would have compelled a reconveyance (8). But where there was an express consideration, an use limited contrary to it was void; as if upon a sale or lease with rent reserved, the use were

(8) Ld. Bacon's Reading on St. of Uses, 317.

feoffor, where the feoffment was made without confideration, grew long after, when uses waxed general; and, for this reason, because when feoffments were made, it grew doubtful whether the estates were in use or in purchase; because purchases were things notorious, and uses were things fecret. The Chancellor thought it more convenient to put the purchaser to prove his confideration, than the feoffor, and his heirs, to prove the trust; and so made the intendments towards the use, and put the proof upon the purchaser." Reading on Stat. of Uses, 317. It seems, however, admitted, that if the feoffor declare no use, and no effectual confideration be implied, that the use will refult to him: fo if he do not limit the whole of the estate, except in the case hereafter noticed, the residue will refult. But if tenant of a particular estate, as tenant for life, grant his estate by fine, and limit the use for years, or for a particular time, it shall not return unto him; because he who hath the particular estate by fine, is subject to rent and forfeiture, which is a fufficient confideration, 2 Roll. Ab. 781. Castle v. Dod, Cro. Jac. 200.

limited

(9) Dyer, 155, a. 1 Leon, 148. 1 Ander. 37. pl. 96. 2 Ander. 136. (10) Hartop's Case, 1 Leon. 254. Lutw. 823. Gilbert's Ufes, 281. Burchett v. Durdant, 2 Ventr. 312. Bronghton v. Langley, 2 Ld. Raym. 875.

limited to the vendor or leffor (9): otherwise of a consideration implied: as in a devise to an use (10), the use may be executed (e), if the intent of the devisor appear to be so. Yet a devise imports a consideration in itself, and therefore cannot be averred to be to the use of another than of the devisee, or for

(e) That in a devise to an use the use may be executed, if fuch appear to have been the intent of the devifor, feems agreed in all the cases; but it has been much doubted whether the execution of the ufe ought to be referred to the operation of the flatute of uses, or to the operation of the statute of wills. In Hore v. Dix, Sid. 26, it is held, that the use is executed by the statute of wills, and not by the statute of uses; and this opinion Mr. Butler, in a very learned note, feems to prefer, Co. Litt. 278. But Mr. Powell, in his effay upon the learning of devises, p. 271, maintains, that the better opinion is, that a devise to uses is executed by the statute of uses, and does with very confiderable force and effect meet the objections urged against fuch opinion. The cases on which he relies as express authorities, are Broughton v. Langley, 2 Lord Raym. 873. Popham v. Bamfield, 1 Vern. 79. But whether the effect of the devile to uses be referable to the one frature, or to the other, or to the joint operation of both, is at this time a point fo purely fpeculative, that I shall content myfelf with referring the Reader

for a jointure, unless it be expressed in the will (11).

(11) Verpon's Case, 4 Rep. 4. a.

to the above note by Mr. Butler, and the reasoning relied on by Mr. Powell.

SECTION II.

AN agreement (f) to raise an equity to have the land ought to have an effectual consideration; as money, pains, and travel, marriage, or natural affection.

(f) Uses which are to be raised by covenant or agreement must be founded on principles of equity; for the cestuique use can have no right by law; therefore no use can be raised by covenant or agreement, without a consideration; for equity or conscience will not entorce donum gratuitum, however apparent the intent, where it is not sufficiently passed by law, Lord Bacon's Readings on Stat. Uses, 310. And in this consists another distinction, between uses raised by covenant and uses raised by conveyance, which operate by transmutation of possession; for though, if there be no use declared, nor consideration given, the use will be to the feosfor, &c. yet if there be an use declared, though there be no consideration to support

For an use will not arise either by deed (g), or deed inrolled, without an actual (b) consideration:

it, the use will be effective, Gilb. Uses, 222, 223, 42, 2 Rolls Ab. 791. I Ander. 37. pl. 95. Perk. § 537. Calthorpe's Case, Moore 102. Mildmay's Case, I Rep. 176. b. Stephens v. Layton, Owen, 40. Sanders' Uses and Trusts, 93, 94. See also Lloyd v. Spillet, Barnard, 384. 2 Atk. 148.

- (g) This must be understood of such uses as do not operate by transmutation of possession, which, as already observed, require no consideration, if the use be declared, Garnish v. Wentworth, Carter, 143.
- (h) Though a confideration be absolutely requisite to the raifing of an use, upon a covenant to stand seised, yet no confideration need be mentioned in the deed: but if the cestuique use stand in a relation which affords of itself a confideration, an use shall presently arise to him; as if a man covenant to fland feifed to the use of his wife or brother, or any of his kindred, this is fufficient to raife an use to them, without any mention of a particular express confideration: for the love and affection between them is obvious; which being a confideration in itself sufficient to raise an use, the limiting of the use shall be referred to such consideration. Gilb. Uses, 251, 252. Bedell's Case, 7 Rep. 40. And so with respect to uses raised by bargain and sale; for though they can only be raifed for an actual and valuable confideration, yet the confideration need not necessarily be expressed in the deed, in order to raise the use; for the bargainee may aver, that money or other valuable confideration was given or paid; and if shewn, the bargain

consideration (1): although a deed, for the solemnity, imports a consideration in law (2). And there are two sorts of good consideration; a consideration of nature and blood, and a valuable consideration (3). But there is this difference between them, that money may be given by one, in consideration of all the estates; for it being given for them, they are made parties to the consideration (4): but natural affection will not raise an use to a stranger (i) to the consideration. And

(1) Gilb. Ufes, 217. 2 Bla. Com. 330. Shepherd's Touchstone. (2) Bacon's Reading on St. of Ufes, 310. Plowd. 308. See 1 vol. b. 1. c. 5. § 1. n. (a). (3) 2 Bla. Com. 297. Twyne's Cafe, 3 Rep. 83. (4) 2 Rolls Ab. 784, pl. 7-2 Inft. 672.

bargain and fale shall be good, 2 Rolls Ab. 790, pl. 3. 2 Inst, 672,

(i) When it is stated, that covenants to raise an use must be sounded on principles of conscience and equity, it might be concluded, that every moral obligation would furnish a sufficient consideration to raise an use, such conclusion, however, would not be correctly drawn, it having been determined, that affection to an illegitimate child is not a sufficient consideration to raise an use, by way of covenant, to stand seised, 1 Ander 75, 79. 2 Rolls Ab. 785. Co. Litt. 123. Harg. note (8). Still ess is the consideration of friendship, long acquaintance, for having been schoolsellows, 2 Rolls Ab. 783, pl. 5, 6. But if a man, in consideration of natural love and affection, covenant to stand seised to the use of his son for life, remainder to such woman as the son should marry, for life, remainder to

the

this is the reason, that a general power (k), in such case, to make leases, or limit uses, to any body, is void. So that a limitation afterwards, though to his daughter, is not good: for a good execution will not profit, where the constitution is desective. And in a covenant to stand seised, where the consideration is general, and the person uncertain, no averment can be taken (5): but when the person

(5) Mildmay's Cafe,

1 Rep. 176, b. Chute v. — 1 Lev. 30. 2 Roils Ab. 260. Crop v. Faultenditch. Cro. Jac. 181. Gilb. Ufes, 218.

the first son of the son on such wise begotten, the estate limited to the wise is well raised, though the wise be a stranger to the consideration; for it is for the advancement of the posterity of the covenantor; for without a wise his son cannot have posterity, Bolls v. Sir H. Winton, Noy, 122. So a covenant to stand seised to the use of the wise of the brother of the covenantor is good, for the love which he bears to his brother extends in his right to his wife, Plowd. 307.

(k) This must be understood of powers created by such conveyances as require an actual and effectual confideration to support them. Mildmay's Case, 1 Rep. 176. b. Chief Baron Gilbert, observing upon this doctrine, doubts whether, if the covenantee had paid money he might not have averred it, and so made good the use to his nominee, Gilb. Uses, 220. See Prince and Wise v. Green, cited in Wilmer v. Kendrick, 1 Ch. Ca. 161. Warwick v. Gerard. 1 Vern. 7.

is certain, such an averment may be taken as stands with the deed. And so where the consideration is particular and certain, as of brotherly love or advancement of his blood; there the person by matter ex post facto, may be made certain (6). And although there be a consideration expressed (1), yet any other may be taken, as stands with it, and is not repugnant (7). And it matters not whether the consideration be past, present, or suture (8): only a consideration executory will not raise an use, till it be executed (m).

(6) Mildmay's Cafe, 1 Rep. 176. b.

(7) Bedell's Cafe. 7 Co. 40. Dyer, 146. 2 Rolls Ab. 790. Filmer v. Gott. 7 Bro. P. C. 70. (8) Chudleigh's Cafe,

1 Rep. 126, 136. Stephens v. Brittedge, Sid. 83. Woodliff v. Drury, Cro. Eliz.

(1) As to what evidence is admissible, to extend or explain a consideration expressed, see 1 vol. b. 1. c. 3. § 11. note (0).

(m) For to every execution of an use by force of the statute of uses, four things, as hereafter more particularly mentioned, are requisite. 1st, There ought to be a person seised; for the words of the act are, any person stand or be seised, &c. 2dly, There ought to be a cestuique use in seise; for the words of the act are, stand seised to the use of any person or persons, &c. 3dly, There ought to be an use in esse, sci. in possession, reversion, or remainder. 4thly, The estate, out of which the uses rise, ought to be vested in the cestuique use; for the words are, that the estate of such person seised to the use shall be adjudged in cestuique use, &c. So that

(9) Barker v. Kate, 2 Ventr. 35. Lloyd v. Spillett, 2 Atk. 148. Barnard, 384. Anon. 22. Vin. Ab. 202, Pl. 2. T. 41 Eliz. B. R.

Neither in a valuable confideration (9) is the quantum regarded in law (n). Nor any averment allowed to the heirs, that the confideration expressed was false, or not paid; for he is estopped by the deed. And upon these considerations, if any agreement be made by the owner of the land, this agreement makes a suf-

that when these four requisites concur, the use is executed within this statute; but if any of them fail, it is not; and therefore it is agreed in Delamere's Case, Plowd. 351, that the statute 27 H. 8, does not execute any use, but only uses in esse; so a right of a present use, or a future or contingent use, are excluded until they come in esse. Chudleigh's Case, 1 Rep. 126. a. 136. a.; and therefore such future or contingent uses may be destroyed by alterations of the estate before they come in esse. Chudleigh's Case, 1 Rep. 138. a. See post B. 2. c. 6. § 1.

(n) In purchases, the question is not whether the confideration be adequate, but whether it be valuable; for if it be such a consideration as will without fraud, make a man a purchaser within the statute of Elizabeth, and bring him within the protection of that law, he shall not be impeached in equity. Basset v. Nosworthy, Finch's Rep. 104. Hobart v. Hobart, 2 Ch. Ca. 159. But see More v. Mayhow, 2 Freem. 175. 1 Ch. Ca. 34. But if the consideration be grossly inadequate, as sive shillings; Qu. Whether a trust will not result for the grantor? See Sculthorp v. Burgess, 1 Vez. Jun. 92. See also Walker v. Burrows, 1 Atk. 94. But see Lloyd v. Spillet, 2 Atk. 150. Barnard, 384.

ficient

ficient equity, for those to have the land to whom it is appointed by the agreement (a). For if an equivalent be given, though the contract be not executed with all the formalities of law; yet in equity the use of the lands ought to be in the purchaser (10). And so if a man parts with any lands in advancement of his issue, and to provide for the contingencies, and necessary settlements of his family, it is sit the Chancery should make such conveyance good, though they want the ceremonies of law (p), so as they may best

(10) Gilb. Uics, 49.

- (a) This proposition must be understood with reference to those general rules which govern courts of equity, in the enforcing of agreements by specific performance. See B. 1 · c. 1. f. 4. c. 3. f. 1.
- (p) This equity of supplying defective conveyances does not extend to all such persons in whose favour the relation of blood would support a covenant, to stand seised to their use, nor does it even now extend to a grandchild, though it was once held that it did. Watts v. Bullas, 1 P. Wms. 61. Freestone v. Rant, T. 1712. Fursaker v. Robinson, Pre. Ch. 475. But in Goring v. Nash, 3 Atk. 189, Lord Hardwicke observed, that it would be pursuing the maxims of law too sar, for it would carry it to the remotest blood that could raise an use in law, and which equity does not regard. And in Tudor v. Anson, 2 Vez. 582, his Lordship

(11) Gilb. Ufes, 47. Coltman y. Senhouse, 2 Lev. 225. best comply with the peace of families; for their establishment is part of the nature and end of government (11). But if I bargain and sell land to my son, no use arises, unless there be a consideration of money (q); for selling, ex vi termini, supposes my transferring a right of something for money, the common medium of commerce (12). And if there be no such consideration, it may be an exchange, a covenant to stand seised, a grant, &c. but it can be no sale (13).

(12) Gilb. Ules, 50.

(13) Gilb. Uses, 52. Ward v.

Lambert, Cro. Eliz. 394.

Lordship refused to extend to a grandchild the relief which the court had given to the widow's children and creditors, by supplying the want of a surrender of copyhold estates.

(q) But if a father, in confideration of natural love and affection, and of 100l. covenant to fland feifed to the use of his son, the principal confideration will carry it, and there needs no enrollment. Garnish v. Wentworth, Carter 144. Baker v. Lade, 3 Lev. 291. 2 Vent. 149. Foster v. Foster, 1 Lev. 55. which would have been requisite if the covenant had been to stand seised to the use of a son, merely in consideration of 100l. the deed in such case operating as a bargain and sale. Bedell's case, 7 Rep. 40. b. Fox's case, 8 Rep. 96.

SECTION III.

AND it was much controverted at first (r), whether a deed were necessary to the raising of an use (1)? In a bargain and sale, it was agreed on all sides, not to have been required at common law, by reason of the consideration given for the land (2); and that was the cause why the see simple would pass at common law, without the word heirs (s).

And

(1) Hore v. Dix, Sid. 26. Dyer, 296,

(2) Gilb.
Uses, 272.
Collard v.
Collard, Poph.
49. See B. 2.
c. 2. § 1. note
(b).

(r) I have already had occasion to refer to the diftinctions upon this point; and as all trusts, except trusts resulting by operation of law or equity, must now be declared in writing, it seems unnecessary to investigate more particularly the distinctions which prevailed at common law.

1

of

C

0

-

t.

n

(e

n

e,

(s) "Before the statute of uses 17 H. 8, if a man bargained and fold his lands for money generally, without inserting words of inheritance, equity would oblige him, according to conscience and the intent of the parties, in regard of the value, to have executed an estate in see; but since the statute, the uses are transferred and made into an estate in the land; and therefore, since the statute, if one bargain and sell his Vol. 11.

And it was faid that a man's blood, and the building up a family, is of more value to him than his money (t). And where, throughout the whole body of the law, shall it be feen, that to any thing which may pass by contract, there needs any other thing than the words which make the contract, as writing, or the like, teftifying it? And that the law was fo, appears by the statute of 27 H.8. (u), which was made to alter it as to the freehold in bargains and fales (3); but, by an exception at the end of the statute, London is,

(3) Collard v. Collard, Poph. 48.

> lands generally, the bargainee hath but an estate for life." Corbet's Case, 1 Rep. 87. b. Shelly's Case, 1 Rep. 100. b. Gilb. Uses, 17, 18. Abraham v. Twigg, Cro. Eliz. 478.

- (t) And as fuch confideration was alledged to be of an higher nature, it was conceived to be a necessary inference, that the use of a covenant to stand seised might be declared by parol; but this inference is not warranted. Gilb. Uses, 271.
- (u) By 27 H. 8. c. 16, all conveyances of an estate of freehold in lands, &c. by bargain and fale, must be enrolled within fix months. See vol. 1. p.-206. note (m).

as it was, at common law (4). And uses, in fuch cases, in respect of marriage, which is always a thing public and notorious, were for the folemnity left at common law, and not restrained, as the bargain and fale, which by common prefumption may be made more fecretly and eafily (5). Yet notwithstanding these reasons, this point hath been fince clearly determined otherwise; for the mischief that would follow, if an use should arise without a fettled resolution, manifested by a deed (6).

(4) 27 H. 8. c. 16. § 2. Dyer, 229,

(5) Collard Collard, Poph. 47.

(6) Collard v. Collard, Moor, 688.

SECTION IV.

AND now, by statute 29 Car. 2: (1) (1) Riddle v. Emersor (x), although a leafe for three years, Vern 108. &c. may be made by parol; yet when it

v. Emerfon,

is

(x) The inconveniences which were found to arise from the allowing of parol declarations of trusts, induced the legislature, by the 29 Car. 2. c. 3. § 7, to require all declarations, or creations of trufts or confidence. is made in writing, the trust of that lease cannot be declared by parol (y). But a confession

fidence, of any lands, tenements, or hereditaments, to be manifested and proved by some writing, signed by the party who is by law entitled to declare fuch trufts, or by his last will in writing. The statute, however, excepts trufts arifing, transferred, or extinguished by operation of law. Upon this legislative provision, it is observable, that it does not extend to declarations of trusts of personalty. Nab v. Nab, 10 Mod. 404. But fee Lady M. Fordyce v. Willis, 3 Bro. Ch. Rep. 577. Neither does it prescribe any particular form or solemnity in writing; a trust of land may, therefore, be declared by writing without feal, if it fufficiently indicate and notify the intention of the parties, that there should be a trust. Shortridge v. Lamplugh, 7 Mod. 76; or by letter from the truftee, flating the trufts declared to which the will referred, Crooke v. Brooking, 2 Vern. 106; or by a bond to perform the trusts of a conveyance referred to, though the trufts be not stated in such bond, Attorney General v. Twisden, Finch's Rep. 336; or by a bond to cestuique trust to affign as he should direct, Moorcrost v. Dowding, 2 P. Wms. 314. See also Parks v. Wilson, 10 Mod. 515; or by an answer in equity, confessing a trust. Cottington a. Fletcher, 2 Atk. 155; or by declaration. that the purchase was made with trust money, Deg v. Deg, 2 P. Wms. 414. Kirk v. Webb, Pre. Ch. 84. Neither does the flatute prescribe any particular form or mode of expression, as necessary to raise a trust; therefore if testator, having devised the whole of his estate, will that the devisee pay his debts, it is suffici-

ent

confession of a trust in an answer for the wife and children, though no proof of

ent to raise a trust for creditors, Clowdsy v. Pelham, I Vern. 411. So words of defire or request in a will, if the property be certain, and the objects certain, will be sufficient to raise a trust, Eacles v. England, 2 Vern. 466. Glynn v. Harding, I Atk. 460. Vernon v. Vernon, Ambl. 4. Palmer v. Scribb, 8 Vin. Ab. 289. pl. 25. Harland v. Trigg, 1 Bro. Ch. Rep. 142. Nowlan v. Nelligan, 1 Bro. Ch. Rep. 489. Pierson v. Garnett, 2 Bro. Ch. Rep. 38, 226. Richardson v. Chapman (Burn's Eccl. Law, Tit. Bishop, p. 220, 5th Ed. But see the case cited in Civil v. Rich. 1 Ch. Ca. 310). So words, not doubting but that the devifee or legatee will dispose of the fund devised in a particular manner, if the fund be certain, and the objects distinctly described, will be sufficient. Massey v. Sherman, Ambl. 520. Wynne v. Hawkins, 1 Bro. Ch. Rep. 179. Nowlan v. Nelligan, 1 Bro. Ch. Rep. 491. But fee Buggins v. Yates, 9 Mod. 122. and it feems now to be fettled that words merely of recommendation, by a person having power to command, shall create a trust. Malim v. Keighley, 2 Vez. Jun. 333, 529. Pushman v. Filliter, 3 Vez. 7. But see Bland v. Bland, 24th February 1745. Le Maitre v. Bannister, 26th November 1770, stated in Mr. Finch's note to Eales v. England, Pre. Ch. 200. Cunliffe v. Cunliffe, Ambl. 686. See also Civil v. Rich, 1 Ch. Ca. 310. and see the observations of the Master of the Rolls (Lord Kenyon) in deciding Pierson v. Garnett, 2 Bro. Ch. Rep. 38; with respect to trusts by implication, see post ch. 5.

⁽y) This point does not appear to have been so determined in the case referred to, Riddle v. Emerson, 1 Vern. 108.

(2) Hampton v. Spencer, 2 Vern. 288. Cottington v. Fletcher, 2 Atk. 155. it, will be good in equity (2). So if the fon prevails upon the mother, to get the father to make a new will, and make him executor in her stead, promising himself to be a trustee for the mother; this will be decreed a trust for the wife, on the point of fraud (2), notwithstanding the statute of frauds and periuries (2).

(3) Roswell statute of frauds and perjuries (3).

1 Rolls Ab. 378. pl. 1. 4 Vin, Ab. 395. pl. 3. Thynn v. Thynn, 1 Vern. 296. Sellack v. Harris, 5 Vin. Ab. 521. pl. 31. Davenish v. Baines, Pre. Ch. 3. Oldham v. Litchford, 2 Vern. 506. Reech v. Kennigate, Amb. 67.

(z) The authorities cited in the margin are abundantly sufficient to shew, that a court of equity will not allow a man guilty of a fraud to protect himself from the consequences, by a statute professedly made to prevent fraud.

SECTION V.

A LSO the declaration of uses ought, 1st, To have a clear and apparent intent, and not to be upon general words, or words spoken in futuro (a). (for these are executory,

(a) As that the land shall come, remain, and be in tail or in fee to A, which being mere words of covenant,

executory, and found only in covenant,) but spoken advisedly, and in præsenti, which is an immediate gist (1). The words must likewise be declaratory, and not obligatory; for then they have another effect (2). 2dly, The declaration must be certain; for else there would be no certainty of inheritances. And this certainty ought to be principally in three things, viz. in persons to whom (3), in lands, &c. (4), of which, and in estates for which (5) the uses are transferred and declared. And if certainty is wanting in any of these (b), the

(1) Callard v. Callard, Cro. Eliz. 343.

(2) Hore v. Dix, Sid. 27. Blitheman v. Blitheman, Cro. Eliz. 279. Moor, 122. 3 Leon. 6. pl. 18. 1 And. 25. pl. 55 Bendl. 121. Buckley v. Symonds, Wynch 60. 2 R. Ab. 788. pl. 1. Englefield's Cafe, Poph. 27. Gilb. Ufes, 60.

Dyer, 87.

(3) Dowman's Case, 9 Rep. 9. a. Shepherd's Touchstone, 520.
(4) Lees v. Ld. Stafford, 4 Leon. 58. Cob. v. Betterson, Cro. Jac 374.
(5) Stukely v. Butter, Hob. 168. Shepherd's Touchstone, 249, 250.

nant, will not raise an use in A. Buckley v. Simonds, Wynch, 60. Blytheman v. Blytheman, Cro. Eliz. 279. Gilb. Uses, 60. 2 Rolls Ab. 788, 789. 3 Leo. 6. pl. 18. 1 And. 25. pl. 55. But though words spoken in future are not sufficient to raise an use in law, yet as it is an established rule in equity, that "whenever parties agree concerning any particular subject, such agreement, as against the party himself, and any claiming under him, voluntarily, or with notice, is sufficient to raise a trust," (see Legard v. Hodges, I Vez. Jun. 477). Quere, Whether such words would not be sufficient to raise a trust in equity.

(b) The uncertainty intended, is that which appears on the face of the deed, and not that which may arise from matter dehors the deed, as where there are two persons

(6) Kirfley v. Duck, 2 Vern. 684. 2 And. 141, 142. Shep. Touch-ftone, 252.

the declaration is not sufficient (6). 3dly, The declaration must be precedent or present, and perfect and complete, and not as a communication in reference to matter, to be put into writing after. Yet a deed subsequent may declare the uses of a recovery, &c. precedent (c); because, in judgment

persons or two estates of the same name; for in such case, as the ambiguity or uncertainty oritur de facto verificatione facti tollitur, Lord Cheney's Case, 5 Rep. 68. Nor does the uncertainty here intended extend to those things which, though uncertain of themselves, may be reduced to a certainty, by means which the law appoints, or which the party himself has assigned. See Stukely v. Butler, Hob. 174: Shep. Touchstone, 250. Nor does it apply to that uncertainty which may be created by a subsequent and supersuous description, nam utile per inutile non vitiatur. Dowtie's Case, 3 Rep. 10. Trapp's Case, 3 Leon. 235. Dyer 376. pl. 25. Hob. 171. See also Ulrich v. Litchsield, 2 Atk. 372. Beaumont v. Fell, 2 P.Wms. 141.

(c) After the passing of the statute 27 H. 8. c. 10. a doubt arose, whether a subsequent deed could declare the uses of a fine or recovery precedent. It was, however, determined in Dowman's Case, that the uses of a fine or recovery precedent might be declared by deed subsequent; and the law so continued until the statute 29 Car. 2. c. 3, when the doubt recurred, whether the resulting use was not so executed by the fine or recovery in the conusor or recoveree, (no uses being previously declared,) as to exclude any subsequent declaration.

judgment of law, it operates against the maker and his heirs (d), viz. by estoppel, since nothing appears to the contrary, that there was a certain and complete declaration of the uses at the time of the recovery (7), &c.

(7) Dowman's Case, 9 Rep.

10. a. b. Dyer, 136. a. 2 Rolls Ab. 782.

claration. To obviate this doubt, the Sta. 4 Ann, c. 16. § 15, enacts, That all declarations of uses, &c. after the levying of any fine, or suffering of a recovery, shall be as good and effectual in the law as if the act, 29 Car. 2. c. 3, had not been made. Quere, Whether this provision extends to semes coverts?

(d) The declaration of the uses, by a deed subsequent to the fine or recovery, though it estops all persons parties to it, does not estop persons who are not. Gilb. Uses, 61. Morley v. Jones, 4 Mod. 261. Carth. 410. Show P. C. 140.

SECTION VI.

AND where the uses of a recovery are declared by deed precedent, no new or other uses can be averred by parol; for nothing vests till the recovery be had, and then the parol declaration shall not controul

(1) Countels of Rutland's Cafe, 5 Rep. 26. Dowman's Cafe 9 Rep. 10. b. Tregame v. Fletcher, 2 Salk. 676.

(2) Countels of Rutland's Cafe, 5 Rep. 26. b.

troul the deed precedent, but all parties are estopped to aver the contrary. And in case of a deed precedent, if the party fet up other uses, he must confess and avoid; for unumquodq; dissolvitur eo ligamine quo & ligatum est (1). 2dly, But if there be two deeds, the last shall stand, and not both; for it would be contrary to the intent of the parties to make an hotchpot and commixtion of them, which, by their creation, were distinct and several, in time, persons, and estates (2). 3dly, This is intended where the fine or recovery is pursuant; for, if they vary, there is room and occasion given to inquire and receive information, that the old agreement was relinquished. And by the same reason, that the use of a fine might have been declared by parol (e) upon an original agreement, it might also, where the original agreement was relinquished. Yet, without fuch averment, the fine shall be intended to the use of the said agreement,

notwith-

⁽e) Since the flatute of fraud, all declarations of uses or trusts must be in writing. Parol evidence is, however, admissible to rebut a resulting use. Roe v. Popham, Dougl. 26. Lord Altham v. E. of Angiesey, Gilb. Rep. 16. 2 Salk. 676.

notwithstanding the variance (3). 4thly, But where they are by deed subsequent, new, or other uses may be averred, without shewing the deed, though there be no variance; because there was no intermediate time, when there might be such agreement made. And the uses arise by the recovery according to that agreement, and cannot be divested by any declaration by indenture subsequent; and if a deed subsequent be set up, the other may traverse those uses (4).

(3) Jones v.
Morley,
2 Salk. 677.
Holt's Rep. 321.
Stapilton v.
Stapilton,
1 Atk. 2.

(4) Tregame v. Fletcher, 2 Salk. 676.

CHAP. III.

Of the Limitation of Uses by the Party.

SECTION I.

BUT although uses were, in their origin, no more than an equitable right to the land, and to be determined only in a court of equity; yet equity often followed the law (1), and especially in voluntary conveyances, or where there was no particular reason to favour one side rather than the other. There is a known and established difference therefore between the limitation and creation of uses. For in their creation (a) the intent

(a) "The various necessities of mankind induced the judges to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses, than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made; but if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and, in the mean while, the ancient use shall remain in the grantor; as when lands are conveyed to the use of A

(1) Coibit's Case, 1 Rep. 88. a. intent of the parties is chiefly to be regarded (2). And if the intent is manifest, though void, yet the conveyance shall

nifest, 2 Inst. 672. Coltman v. Senhouse, T. Jones, never Rep. 106. Fox's Case,

(2) Co. Litt.

8 Rep. 93. Makepiece v. Fletcher, Com. Rep. 459. Shelly's Cafe, 1 Rep. 100. Hore v. Dix, Sid. 26.

and B, after a marriage shall be had between them (2 Rolls. Ab. 791). Woodliffe v. Drury, Cro. Eliz. Samme's Case (13 Rep. 56. b.). Or to the use of A and his heirs, till B shall pay him a sum of money; and then to the use of B and his heirs (Bro. Ab. tit. Feoffm. Ab. Uses, 30). Which doctrine, when devifes by will were again introduced and confidered as equivalent in point of construction to declarations of uses, was also adopted in favour of executory deviles. But herein those which are called contingent or springing uses, differ from an executory devise, in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the seoffee to such use be destroyed, by alienation, or otherwife, before the contingency arises, the use is destroyed for ever. (Chudleigh's Case, 1 Rep. 134, 138.) Whereas, by an executory devise, the freehold itself is transferred to the future devisee. (See Fearne's Essay on Contingent Remainders and Executory Devises, 298, 3d Ed.) And in both these cases a see may be limited to take effect after a fee. (Carpenter v. Smith, Pollexf. 78. Marks v. Marks, 10 Mod. 423.) Because, though that was forbidden by the common law, in favour of the Lord's escheat, yet when the legal estate was not extended beyond one fee simple, such subsequent uses (after a ule in fee), were before the statute permitted to be

7

1

t

d

of

e

es

d,

it

et

it

7.

n

ne

A

never take effect any other way. As if uses are limited upon the estate intended to be transferred, or there be any other circumstance in the deed that shews he defigned to pass it at common law (3); because

(3) s Rolls Ab. 787. pl. 3. Co. Litt. 49. a. Samon v. Jones,

2 Ventr. 318. Gilb. Uses, 49. Daw v. Newborough, Com. Rep. 242. Key v. Gambie, T. Jones. 123. But see 2 Wils. 22, 75.

limited in equity, and then the statute executed the legal estate in the same manner as the use before subfifted. It was also held, that a use, though executed, may change from one to another, by circumstances ex post facto; as if a man make a feoffment to the use of his intended wife, and her eldeft fon, for their lives. Upon the marriage, the wife takes the whole use in feveralty, and upon the birth of a fon, the use is executed jointly in them both. This is fometimes called a fecondary, fometimes a shifting use. And whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during fuch impossibility, and is stiled a resulting use; as if a man make a seoffment to the use of his intended wife, with remainder to her first born, in tail; here, till he marries, the use results back to himself. After marriage, it is executed in the wife, for life; and if the die without iffue, the whole refults back to him in fee. (Bacon of Ufes, 350.) It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land; provided the grantor referved to himself such a power at the creation of the estate. Whereas the utmost that the common law would allow, was a deed of defeazance, coeval with the grant itself.

because the intent is the great director of uses, and no construction can be made against the intent apparent. Yet the precise technical words (4) of bargain and sale, or covenant to stand seised, are not required to raise an use (b): but any words sufficient to show the intent, or that are tantamount, with good consideration,

(4) Coltman v. Senhouse, 2 Lev. 225. Mudge v. Mudge, Com. Rep. 334.

itself, and therefore esteemed a part of it, upon events specifically mentioned. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind, who, as Lord Bacon observes (on Uses, 316), "have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards." 2 Bla. Com. 334, 335. The above extract is sufficient to shew, that in the creation of estates by way of use, more indulgence is allowed to the intent of the parties, than in the creation of estates by conveyances at common law.

(b) Conveyances by bargain and fale enrolled, which (money making no part of the confideration) could not operate by way of bargain and fale, have been allowed, in respect of the intent of the parties, to operate by way of covenant to stand seised, the confideration allowing of such construction. Crossing v. Scudamore, 2 Lev. 9. Walker v. Hale, 2 Lev. 213. Osman v. Shease, 3 Lev. 370. Mudge v. Mudge, Com. Rep. 334. Thorne v. Thorne, 1 Vern, 141. Thompson

deration, will do (c). And the Judges have more regard for the substance than the shadow and form, and will make a man's intent good in passing his estate, if by any lawful means it may take effect (5).

(5) Shove v. Pincke, 5 Term Rep. 124.

Thompson v. Atsield, I Vern. 40. so also a defective feossiment shall operate as a covenant to stand seised. Habergham v. Vincent, 2 Vez. Jun. 226. And the rule laid down, Co. Litt. 49. a. and acted upon in the cases referred to in the margin (2), namely, That where the intent appears to pass the estate by a common law conveyance, if it cannot so pass, the conveyance shall not operate as a covenant to stand seised to uses, seems materially broken in upon by the judgment of C. B. in Roe on demise of Wilkinson v. Tranmer, 2 Wils. 75. Doe on demise of Milbourne v. Assignees of Simpson, 2 Wils. 22.

(c) It is a general rule in equity, that, where there be a confideration, the imperfect execution of the contract shall not invalidate the equity raised by the agreement; but this rule does not extend to cases in which the contract is defectively executed in particulars prescribed by the Legislature. See Hibbert v. Rolleston, 3 Bro. Ch. Rep. 571. Williams v. D. of Bolton, 2 Vez. Jun. 138.

SECTION II.

BUT, as forms and technical words in conveyances are appointed by law for the general peace and quiet, the words of limitation of estates created by deed must be the same, by way of use, as in a seossement (1), and in all common assurances (d); and thus uses created by deed differ

t

e

,

f

S

h

Z-

(1) Corbet's Cate, 1.Rep. 88. Carpenter v. Smith, Padext. 79. Neville v

Neville, 1 Rolls Ab. 837. Gilb. Ufes, 75. Sanders' Ufes. 168.

(d) Whether words of limitation are, in the confiruction of uses created by deed, to receive the strict technical exposition which they receive in the conftruction of common law conveyances, or the more liberal exposition which is allowed in the construction of wills, is a point upon which a difference of opinion appears to have prevailed. In Corbet's Cafe, 1 Rep. 88. a. it is stated, that "before the statute of 27 H. 8. the Chancellor, in the case of an use judged by the imitation of the rules of the common law, and according to the nature and quality of the land, as in case de possessione fratris, Borough-English; and so his judgment was by way of imitation. And the makers of all the statutes concerning uses, as 1 R. 3. c. 5. 4 H. 7. c. 17. 9 H. 7. c. 15. and all other statutes have made uses to imitate and resemble estates in posfession, and to be guided and directed according to the rules and reason of the common law." See also Fitzwilliam's Case, 6 Rep. 34. Lisle v. Gray, Raym. 317. Carpenter v. Smith, Pollexf. 79. And in Atwaters v. Birt, Cro. Eliz. 856, it was expressly held, that a feoff-VOL. II. ment

differ from a devise: For there, any words which shew the intent are sufficient, if it could

ment to uses shall not be expounded as a will; and on that ground it was refolved, in Neville v. Neville, 1 Rolls Ab. 837. pl. 1, that a fcoffment to the use of A. and his issues male of his body, conveys not an estate tail. See also Gilbert on Uses, 75. Sanders on Uses, 168. But in Leigh v. Brace, Carth. 343, the Court is reported to have stated, that a conveyance by way of use had always been construed like wills, with respect to the intention of the parties, and is not tied up to the strict form of conveyances at common law; and determined, that, from respect to the intent of the feoffor, a limitation by feoffment to the use of T. B. and his heirs for ever was cut down to an estate tail, by the subsequent words, and for default of iffue of the body of T. B. See also I Vent. 373. But, quære, Whether the construction of the above limitation would not have been the fame in a common law conveyance? See 19 H. 6. c. 74. b. And if the construction would have been the fame, it was unnecessary to refort to the doctrine maintained by the Court. It may be material also to remark, that the rule laid down in Leigh v. Brace, was not followed in Makepiece v. Fletcher, Com. Rep. 457. In Rigden v. Valliere, 2 Vez. 257. 3 Atk. 731. Lord Hardwicke having flated the general objection, that it would create confusion and uncertainty, if deeds to uses were to receive, as to their limitations, a construction different from that which would be given to feoffments or other conveyances at common law; for the statute joining the estate and the use together, it becomes one intire conveyance, by force of the statute, and the words

could be made good by any conveyance in his life-time; because the law intends the devisor

words are to be confirued in the fame way; but this is to be taken with fome restrictions. As to the words of limitation in a deed, they are, to be fure, to be construed in that manner, viz. in the same sense; but where they are words of regulation or modification of the estate, as the words equally to be divided are, and not words of limitation, I think there is no harm in giving them greater latitude in deeds on the statute of uses, which are "trusts at common law, than on feoffments, which are strict conveyances at common law." This diffinction appears to have been recognized in Goodtitle v. Stokes, Wilf. 341. But in the case of Stratton v. Best, 2 Bro. Ch. Rep. 233, upon its being very forcibly arged, Lord Thurlow, Chan. stating the question to be, "Whether deeds to uses, in the nature of wills, should be construed as widely as wills have been?" observed, that he should be forry to give into this, for he thought that no good had been done by the wide confiruction of wills." See also Mr. Booth's opinion, published in a collection of Cases and Opinions, page 279. With respect to the limitation of uses of copyhold estates, it was held, in Fisher v. Wigg, 1 P.Wms. 14, by two Justices against Holt, C. J. that a furrender of a copyhold to uses is not to be construed with the same strictness as a common law conveyance; and though the authority of this decision appears to have been very much shaken by the determination in Idle v. Cook, 1 P.Wms. 70, vet it has, in latter cases, been recognized, as affording a found distinction. See Rigden v. Valliere, 2 Vez. 257. Goodtitle v. Stokes, 1 Wilf. 341. But see Seagood v. Hone, E 2 Cro.

t

1

e

d

e

e

e

devisor to be inops confilii, wills being usually made in extremis. So that any words which shew the intent, that the devisee should have the land for ever (e), will make

Cro. Car. 366. And in support of the decision, it is observable, that as copyholds are not within the statute of uses, Rowden v. Malster, Cro. Car. 44, the limitations of a furrender must remain as before the statute; and if the antient construction of limitations of a use of freehold estate be in any degree affected by the statute of uses, the construction of limitations of copyholds remaining the fame, must be referred to copyholds not being within the statute, which has varied the construction of limitations of freehold. the limitations of a trust executed, (as contra-distinguished from trusts executory,) are to be construed by the fame rules which govern the construction of limitations in a fimilar instrument, immediately including or carrying the legal estate, (whatever doubts formerly prevailed,) feems to be now a point clearly and incontrovertibly established. See Jones v. Morgan, 1 Bro. Ch. Rep. 222, where the cases upon this point are very elaborately confidered. But in the construction of mere articles or trufts purely executory, words of limitation are very properly allowed to receive a more liberal and indulgent construction. See B. I. c. 6. § 8. note (q).

(e) The intent of the devisor, if plain and manifest, will certainly be sufficient to supply the want of those words which are necessary in deeds to convey an inheritance; but in all such cases the intent must

make a fee-simple, without the word heirs, as in perpetuum, or paying where the payment is of a sum in gross, and he may not be able to pay it out of the profits (2). So where he has power to give a fee, he is construed to have one, unless he has an express estate divided from the power (3). And in general, wherever lands are devised for a special purpose, or for payment of debts, or the like (4), without any words of limitation, he shall have an estate in see to answer that purpose, by implication of law (f). So where A. having only a remainder

(2) Co. Lit. 9. b. Gilb. Dev. 19.

(3) Thomlinfon v. Dighton, 1 Saik. 240. 1 Bulf. 222. 1 Rolls Ab. 834 Leon. 41. (4) North v. Compion, 1 Ch. Ca. 196. Tibbots v. Hurit 1 Ch. Rep. 168. Collier's Cafe, 6 Rep. 16. a. Ackland v. Ackland, 2 Vern. 687.

Doe v. Woodhouse, 4 Term Rep. 89. Kerman v. Johnson, Style's Rep. 281. 1 Rolls Ab. 834. pl. 14. Anon. 9 Mod. 92.

be manifest, and the implication absolutely necessary; for the heir at law shall never be disinherited by a conjectural or possible implication. Gardner v. Shel-Bowes v. Blackett, Cowp. 235. den, Vaugh. 259. Therefore, though a devise to A. and his affigns in perpetuum, be sufficient to carry the fee, from the evidence it affords of the intent of the devisor, yet a devise to A. and his affigns, without annexing words of perpetuity, will pass only an estate for life; a larger estate not being necessary to the operation of such devise. Co. Lit. 9. b. As to what words will carry the fee, and what not, fee Gilb. Dev. 19. 3 Com. Dig. Devise, N. 4. In what cases a fee will pass by deed without the word heirs, fee 2 Bla. Com. 108, 109.

(f) Where an estate is devised to A. without words of

remainder in fee, after an estate tail to B. devises all the house called the Bell Tavern

of inheritance, subject to the payment of a fum in gross, A. shall take a fee, because he is to pay the money in all events, and he may die before he repays himself out of the estate; in which event he would be a loser by the devise, if he were not to have a fee. Collier's Cafe, 6 Rep. 16. a. 1 And. 38. pl. 100. 2 Mod. 25. Freak v. Lee, 2 Lev. 249. Wellock v. Hammond, Cro. Eliz. 204. Salmon v. Denham, Com. Rep. 323. Yet even in such a case, A. shall not have the fee, if a contrary intention manifestly appear. Bacon v. Hall, Cro. Eliz. 497. But where the payment of a certain fum is directed to be made annually. or otherwise, out of the rents and profits, the devisee shall in general take but an estate for life; for though he takes the land charged, yet he is to pay no faster than he receives, and therefore cannot be a lofer. Collier's Cafe, 6 Rep. 16. Bendloe's Rep. 15. Anfley v. Chapman, Cro. Car. 157. Shailard v. Baker, Cro. Eliz. 744. Spicer v. Spicer, Cro. Jac. 527. Baddely v. Leppingwell, 3 Burr. 1533. Blackett, Cowp. 235. 8 Vin. Ab. Devise, (S. A.) 1 Eq. Ca. Ab. 177. But though the circumstances of the charge, being directed to be paid out of the rents and profits, is in general fufficient to restrain a devise, without words of inheritance, to a mere estate for life; yet if there are circumstances whence it can be collected, that the devisor intended the devisee to take a larger estate, such circumstances will be allowed to prevail. Webb v. Herring, Cro. Jac. 415. Frogmorton v. Hollyday, 3 Bur. 1618. Doe v. Woodhouse, 4 T. Rep. 89. See also Lee v. Withers, T. Jones, 107.

Tavern to C. without faying for what estate the see passes, otherwise C. should have nothing (5). And, although in a deed (g) an implication is never admit-

(5) Cole v. Rawlinfon, 1 Salk. 234. Moor, 873.

It may here be material to observe, that though where the devise be general, the circumstances of a charge of a grofs fum will by implication give the devifee an estate in fee, "from the certainty, that the devisor must mean a bounty and benefit to his devisee; yet there is no instance of such implication, where an estate for life, or an estate tail, is expressly given." Doe v. Fyldes, Cowp. 841. Slater v. Slater, 5 Term Rep. 335. See also King v. Melling, 1 Vent. 227. Nor will the circumstance of the charge being in such case payable to A. and his heirs, enlarge an estate devised for life, or in tail; but the charge in fee shall iffue out of the whole estate, and not out of the particular estate only; and being governed by the directions of the will, it shall take effect according to the limitations thereof, and charge the whole of the inheritance. Dutton v. Ingram, Cro. Jac. 427.

(g) The authorities referred to in the margin (6), distinctly support this doctrine. It seems, however, to be materially affected by the case stated by Perkins, § 173, which is an instance of an estate tail arising by implication, even in a deed; and the authority of this case was recognized by Holt, C. J. in Idle v. Cook, 1 P. Wms. 78; and by Powel, J. in Bamfield v. Popham, 1 P. Wms. 57. It may also merit consideration, whether, supposing the doctrine to hold as to freehold, it extends to copyhold estates, it having been

(6) Seagood
v. Hone,
Cro. Car. 366.
Pybus v. Mitford, 1 Ventr.
376. 379.
Vaugh. 261.
Davis v. Speed,
4 Mod. 153.
(7) Cole v.
Livingftone,
1 Ventr., 224.
(8) Horton v.
Horton.

ted (6), neither shall there be cross remainders upon construction of it (7), yet in a will it is otherwise (8); but there must be an express intent to be collected out of the words, or a necessary implication (b) or else the heir shall not be disinherited,

Cro. Jac. 75. Fawkner v. Fawkner, 1Vern. 21, 22. City of London v. Garway. 2Vern. 571. Gilbert v. Witt, Cro. Jac. 655. Holmes v. Meynell, T. Jones, 172. Wright v. Holtord, Cowp. 31. Phipard v. Mansfield, Cowp. 797. See vol. 1. p. 443.

been held, that a deed, declaring the uses of a copyhold estate, is not to be construed with the same strictness as a common law conveyance, but like a will. Fisher v. Wigg, 1 P. Wms. 14. Rigden v. Valliere, 2 Vez. 257. Whence it should follow, that it allows of such implications as are permitted in the construction of a will. But see Idle v. Cook, 1 P.Wms. 70, and Mr. Cox's note to Fisher v. Wigg, 1 P.Wms. 14. With respect to resulting uses in a deed, though frequently treated as estates arising by implication, they cannot, with strict propriety, be so considered, such estates being part of the antient use not disposed of, and not a new estate created by implication of law. See 1 Ventr. 379.

(b) Although I have already had occasion to refer to some of the instances in which implication is allowed to prevail in the construction of a will, it will, I trust, not be deemed an unnecessary addition to consider the doctrine somewhat more particularly.

In the construction of a will, an estate may arise, be enlarged, controuled, and even destroyed by implication. 9

S

,

y

difinherited, for his title is clear, and not to be doubted of (9).

(9) Gardner v. Sheldon,

Vaugh. 263. Spirt v. Bence. Cro. Car. 369. 1 Freem. 74. Doe v. Holmes, 2Will. 80-Bowes v. Blackett, Cowp. 235.

plication. 1st, An estate may arise by implication; as where an estate is limited to the heir of the devisor after the death of the wife of devisor; for the intent of the devisor is clearly to postpone the heir till after her death; and if she does not take it, nobody else can. Horton v. Horton, Cro. Jac. 75. 1 Ventr. 376. So if the devise over be to one of two or more coheiresfes, Hutton v. Simpson, 2 Vern. 723. term be bequeathed to the executors after death of teftator's wife, she shall have it for life by implication. Horton v. Horton. 2d, An estate may be enlarged by implication; as where an estate is devised to A. generally, and, for want of iffue, the remainder over to B., A. shall take an estate tail by implication. For though the devise to A. generally would of itself pass only an estate for life, yet as no benefit is given to B. while there is any iffue of A. the confequence would be, that as no interest springs to B. and no express estate is given to the iffue of A., after the death of A. the intermediate interest would be undisposed of, unless A. were confidered as taking for the benefit of his iffue, as well as of himfelf; and as the words are capable of fuch amplification, the Court naturally implies an intention in the testator that A. should so take, that the property might be transmissible through him to his issue; and he is therefore considered to take an estate tail, which will descend on his iffue; per Lord Thurlow, C. Knight v. Ellis, 2 Bro. Ch. Rep. 578. As to a bequest of a chattel or personalty, by such words, fee Fearne's Effay on Exec. Dev. 363; where the di-

versity taken in some cases between a limitation of a term, by fuch words, as in the case of real estate, would give an express estate tail; and a limitation of the fame, by fuch words, as in the case of a real estate, would only give an effate tail by implication; is very fully confidered, and faid to be overturned. though it be agreed, that an estate devised generally may, by implication, be fo enlarged, yet it has been faid, that an effate expressly given for life cannot be enlarged to an estate tail, nam expressum facit cessare taci-Bamfield v. Popham, I P.Wms. 54. Luddington v. Kime, 1 Ld. Raym. 204. It is certainly generally true, that an estate expressly and distinctly defined by the testator shall not be enlarged by implication; but, if the manifest general intent of the testator require it, Courts of Justice will, in order to effectuate fuch general intent, difregard the particular intent, however expressly declared, if inconsistent with the general intent. Robinson v. Robinson, 1 Burr. 44, and the cases there cited. Doe v. Applyn, 4 Term Rep. 82. Doe v. Halley, 8 T. Rep. The question, therefore, in all fuch cases, is, Whether the manifest general intent can receive effect, without enlarging the effate of the devisee for life? If the testator appear to have intended to extend his bounty to the iffue of the devifee for life, and by making the remainder over, dependent on the want of iffue of the devifee for life, (fuch most probably was his intention), how can fuch intent receive effect, unless the devisee take an estate descendible to his iffue? for it feems clear that the iffue could not take as purchasers by implication. See Lady Lanesborough v. Fox, Forest, 262. Bodens v. Watson, Ambl. 478. See Cro. Eliz. 16, and Fearne's Effay, Ex. Dev. 325. But, if the iffue cannot take as purchasers, they can only take by the estate being transmissible, for which purpose the ancestor must take a defcendible

fcendible estate, and in thus making the particular intent give way to the manifest general intent, Courts of Justice do no more than the testator himself would probably have done, had he been apprized that his general purpose required him to give up his particular But, in collecting the general purpose of the testator, the particular intent is always regarded; and if one can receive effect without prejudice to the other, it is certainly the duty of Courts of Justice to allow it to prevail: and, to fuch confideration, the decifion of Bamfield v. Popham is referred by Lord Hardwicke, in Allanson v. Clitherow, IVez. 26. his Lordfhip conceiving the case not to have required that the express estate for life should be enlarged to an estate in tail male, in order to effectuate the testator's intention as to the male iffue of the devifee for life, there being an express limitation in tail male to the devisee's first and other fons. The circumstance of the testator having limited an estate in tail male to the first and other fons of the devifee for life, might, in the event which had happened, render it unnecessary to enlarge the estate of the devisee for life; but the construction of a will is not to vary with events: Suppose, therefore, that the eldeft fon of the devifee had died in the life-time of the testator, the devise to him would have lapsed, and his iffue male would confequently have been excluded from taking under the will. White v. White, I Bro. Ch. Rep. 219. See Ambrofe v. Hodgfon, Dougl. 340. Denn v. Bagshaw, 6 Term Rep. 512. But the limitation over was not to take effect while there was iffue of the devifee for life; an intention which, with reference to the above possibility, could only receive effect by enlarging the estate of the devisee for life. The case of Bamfield v. Popham must therefore, as it feems to me, be allowed to be a decision against the general intent, in order to effectuate the particular.

cular. With respect to the authorities referred to by Mr. J. Powell, in the case of Luddington v. Kime, I shall have occasion to consider them as instances which reftrain the enlargement of estates by implication, but which are not, at least direct, authorities against the proposition for which I am now contending, namely, that an effate, though expressly devised for life, may by implication be enlarged to an estate tail; in support of which, see Langley v. Baldwin, as stated by Lord C. Hardwicke, in Allanson v. Clitherow, 1Vez. 26. and Robinson v, Robinson, 1 Burr. 44. But, though an estate expressly limited for life may, in order to effectuate the implied intent of the testator, in favour of the issue of the devisee for life, be enlarged to an estate tail, it remains to consider, whether it can be enlarged, if the testator has not only limited the effate expressly for life, but superadded negative words, restrictive of the devisee taking a larger estate, as no longer, only, non aliter-Wedgwood's Case, Backhouse v. Wells, Cross v. Wadhold, are frequently referred to as authorities against the enlargement of an estate for life, if negative words restrictive of a larger estate be superadded. Lord Hale, in his judgment in King v. Melling, 1 Vent. 231, does certainly recognize Wedgwood's Cafe, H. 13. Car. 2. which was a demise to A. for life, and non aliver, and after his decease to the sons of his body; in which case A. was held to take only an estate for life; and according to Lord Hale, by reason of the words non aliter. The case is very shortly stated, but, from such statement, it seems difficult to apply it as an authority to shew that the particular intent shall, in respect of negative and restrictive words, control the manifest general intent, for it does not appear that the general intent required that the estate for life should be enlarged. The only question in the case probably was, Whether such a limi-

tation

tation did not by the positive rules of law, without reforting to the doctrine of implication, amount to an estate tail? and, if it did not by force of some fundamental rule of law amount to an estate tail, it seems to have been wholly unnecessary so to construe it, for the purpose of effectuating the teltator's intent; there being an express limitation to the fons of the devisee for life, by which they might have taken as purchasers. Backhouse v. Wells, 10 Mod. 181, was a devise to J. S. to have and to hold for the term of his natural life only, without impeachment of waste, then to the issue male of his body, remainder to the heirs males of the body of that iffue; J. S. was held to take only an estate for This decision is frequently referred to the force of the word only; but, whatever might be the true ground upon which the decision proceeded, it does not appear in any degree to affect the general rule which I have already stated; namely, that the manifest general intent shall control the particular intent, however expressly declared; for the general intent was provided for by the limitation to the iffue, and the particular intent was confiftent with it: The doubt therefore was not, whether the particular intent was confisent with the general, but whether the particular intent was confistent with the established rules of law; and that it was allowed to prevail, must be referred to the limitation being to the iffue male, and not to the heirs male; the word iffue being fometimes a word of purchase, and sometimes of limitation, but the word heir being always a word of limitation. If therefore the limitation over had been to the heirs male, instead of the issue male of the devisee for life, the operation of law would have been too firong for the intention, notwithstanding the restrictive and negative words used to declare it. The next case referred to against the enlargement of an estate expressly

pressly limited for life, with negative words restrictive of the devisee taking a larger effate, is Goodtitle ex Dem. Cross v. Wadhold, M. 19 G. 2. C. B. cited in Robinson v. Robinson, 1 Burr. 45. which was a devise to the testator's eldest fon only for life, and, in case of failure of iffue, the estate to descend and come to his the tellator's male children; the tellator's eldeft fon was held to take only an estate for life, because, being expressed to be given for life only, with negative words, it could not be enlarged by implication; and Lord Hale's opinion in the case of the King v. Malling, and the determination in Backhouse v. Wells, are said to have been relied on by the Court of Common Pleas. Having already confidered how far the cases referred to by Lord Hale, and the decision in Backhouse v. Wells, break in upon the general rule, that the particular intent shall, if inconfistent with, give way to the general in--tent; and having, I trust, shewn that there was no occafion in either of those cases to control the particular, in order to effectuate the general intent, I cannot but be furprifed that a case so immediately within the rule, as the cafe of Cross v. Wadhold, should have been decided upon the authority of cases so distinguishable from The case of Cross v. Wadhold, so far as it is stated, affords clear and direct evidence of the testator's intent as to these points: 1st, That his eldest son should have only an estate for life; 2dly, That the limitations to his the testator's male children should not take effect until failure of iffue of fuch eldeft fon; and 3dly, I fubmit. That it affords a fair inference that the testator alfo intended the iffue of fuch eldeft fon to take after the death of fuch eldest son. To give effect to the words restrictive of the son taking a larger estate, it was held he took only an estate for life. It may be material to confider how fuch construction, bore upon the rest of the will. If the iffue can be prefumed to have been objects

objects of the testator's bounty, could they take any benefit under his will, confiftently with fuch construction, that the fon took only an effate for life? if they could, it must be by allowing them to take as purchasers; but there was no effate expressly limited to them, and, as already observed, an estate is never implied to issue as purchasers. Lady Lanesborough v. Fox, Forrest, 262. Bodens v. Watson, Ambl. 478. The fon therefore by the decision taking only an estate for life, the prefumed intent of the tellator as to the iffue was necelfarily difappointed, as they could not take through him, he not taking a descendible estate, nor as purchasers, there being no estate expressly limited to them. But further, the teflator's male children are not to take until failure of issue of the eldest son, how can this intent receive effect if the iffue are excluded from taking as purchasers, and the eldest fon has only an estate for life? Can it receive effect as a contingent remainder? certainly not, for it will not necessarily vest at the determination of the particular estate. Can it be supported as an executory devise? certainly not; for it is limited after an estate of freehold, and is besides too remote, as the eldeft fon's iffue might continue beyond a life or lives in being, and twenty-one or more years afterwards. Thus it appears, that by too first a regard to the particular intent of the testator, not only the prefumed general intent in favour of the iffue was disappointed, but also the declared intent in favour of his other male children. I have now submitted the feveral observations which occur to me on the cases which are thought to break in upon the general rule that the particular intent, however expressly declared, shall give way to the manifest general intent, and shall conclude this discussion by referring to Robinson v. Robinfon, I Burr. Rep. 38. and Denn v. Bagfhaw, 6 Term

Rep. 512. where the cases are collected and confidered.

With respect to the enlarging of estates, by allowing of cross remainders by implication, the cases referred to in the margin (8) are distinct authorities in support of such doctrine, subject however to the exception hereafter mentioned. It may also be material to observe, that though cross remainders are favoured in the construction of a will as between two, they shall not be savoured between more than two, Phipard v. Mansfield, Cowy. 800. Perry v. White, Cowp. 780. Wright v. Holford, Cowp. 31. and cases there cited. As to estates arising by implication in respect of a charge; see B. 2. c 3. § 2. note (f).

adly, An express devise may also be controlled by implication, as where the devise is to A. and his heirs, and if he die without heirs, then to one who is or may be the devisee's heir at law, the devisee shall take only an estate tail, though the limitation be in fee; for it is impossible that the devisee should die without heir while the remainder-man, or his iffue, continue, and therefore the first limitation to his heirs shall be restrained in favour of the intent of the devisor. Webb v. Herring, Cro. Jac. 415. Chaddock v. Cowley, Cro. Hearne v. Allen, Cro. Car. 57. Brice v. Smith, Com. Rep. 539. Nottingham v. Jennings, 1 P.Wms. 23. Tyte w. Willes, Forrest, 1. Tillburgh v. Barbut, 2 Vez. 89. Pickering v. Towers, Ambl. 363. But quere, Whether the same construction would not prevail in a deed? (see T. 19 H. 6. 74. b.) See Leigh v. Brace, 5 Mod. 268, Canon's Cafe, 3 Leon. 5.

4thly, An estate devised may be revoked or destroyed by implication, as if the devisor do some act inconsistent with the operation of the devise; as where having devised in see he grant the devisee a lease of the same land, to commence after his, the devisor's death,

Coke v. Bullock, Cro. J. 49. or mortgage the lands devised in see to the devisee, Harkness v. Bayley, Pre. Ch. 514, or do any act inconfistent with the operation of the devise. So also a change in the situation of the devisor will amount to a presumptive revocation of a devife of lands, as if a man having by his will devifed the whole of his real estate, afterwards marry and have a child, this will operate a prefumptive revocation of his will, Spragge v. Stone, Ambl. 721, and Christopher v. Christopher, there cited, Jackson v. Hurlock, Ambl. 487. Parfons v. Lance, Ambl. 557. Wellington v. Wellington, 4 Burr. 2165. So though the child be a posthumous child, Doe dem. Lancashire v. Lancashire, 5 Term Rep. 49. but in such case the presumption may, as in other cases of mere presumption, be rebutted by evidence, Brady v. Cubit, Dougl. at; and quere, if all the above-mentioned circumstances, namely, a prior disposition of the whole real estate, marriage, and the birth of a child must not concur in order to raise the presumption? See B.4. p. 1. c. 2. s. 4. note (b).

Having confidered the cases in which estates may be raised, enlarged, controlled, or destroyed by implication; I shall now endeavour to bring together the leading cases in which the dostrine of implication has not been allowed to prevail, for the purpose of raising an estate, or enlarging, controlling, or destroying an estate devised.

1st, If an estate be devised to a stranger after the death of testator's wife, she shall not have it by implication. See Higham v. Baker, Cro. Eliz. 16. Horton v. Horton, Cro. J. 75.

If an estate be devised to A. and the heirs male of his body, and if he die without issue of his body, re-Vol. II.

李

mainder over; A. dies without issue male, having issue female, no estate will arise to such issue semale by implication. Higham v. Baker, Cro. Eliz. 16. Moor, 124. Lady Lanesborough v. Fox, Forrest. 262. Bodens v. Watson, Ambl. 478.

2d, When the devise takes a particular estate of inheritance by express words in the will, such estate shall not be enlarged by implication. Turke v. Frencham, Dyer, 171. When express and distinct estates are limited to two or more, and their several and respective issues, and for want of such issue over, cross remainders shall not be implied, the words several and respective being sufficient to sever the titles. Davenport v. Oldis, 1 Atk. 579. Clatche's Case, Dyer, 330. Perry v. White, Cowp. 777. Phipard v. Mansfield, Cowp. 800.

An estate expressly devised for life, shall not be enlarged by implication, in respect of the devisee having the power to appoint generally in see, 4 Leon. 41. Tomlinson v. Dighton, 1 Salk. 240. a fortiori, such an estate will not be enlarged by a limited power to appoint. Leife v. Saltingstone, 1 Mod. 189. 1 Salk. 240.

An estate expressly devised for life, or in tail, shall not, as already observed, be enlarged: in respect of the devisee being charged with the payment of a sum in gross, see note (f), B. 2. c. 3. s. 2.

3d, An estate devised to A. and his heirs, shall not be controlled and cut down to an estate tail in respect of the words, "and if he die without heirs, remainder to B." if B. is a stranger who cannot be heir to A. See Tyte v. Willes, Forrest. 1.

4th, An

4th, An estate devised shall not by implication be revoked or destroyed by any charge consistent with the operation of such devise. Thorne v. Thorne, I Vern. 182. Hale v. Dunch, I Vern. 329. I Vern. 342. Nor by any change in the situation of the devisor, as marriage and the birth of a child, if the testator has not disposed of the whole of his estate. See Brady v. Cubit, Dougl. 31.

It is perhaps fearcely necessary to observe, that these observations are confined to devises of real estate; in their principle they indeed extend to chattels and personal estates, but from the different nature of the subject, they are, in a few instances which will be noticed, differently affected by its application.

SECTION III.

SO if the intent of the testator may be collected out of his will, that he designed an estate tail, though the word (body), which properly (i) creates an estate tail,

11

n

er

e

n

(i) As the word heirs is generally necessary to create a fee, so the word body, or some other words of procreation, are necessary in a deed or common law conveyance, to create a fee tail; but if there be both words of inheritance and of procreation, ascertaining the F 2 body

(1) Beresford's cafe. 7 Rep. 41. King v. Melling, 1 Ventr. 228, 229, 231. 1 Rolls Ab. 835 pl. 3. 837. Co. Lit. 9. 27. 3 Mod. 123. 3 Lev. 70. (2) Newton v. Bernardine, Moor, 127. Sonday's ca'e, 9 Rep. 128. Cozen's cafe, Owen, 29. Pinbury v. El-kin, 2 Vern. 766.

tail, is left out, yet it is an estate tail (1). As if lands are devised to one, and if he dies before issue (k), or not leaving issue (2), or not having a son (3), all these limitations create an estate tail. And the meaning of the testator is to be spelt out by little hints (4), and no word to be rejected (1) which may possibly be made to stand (5). And therefore a devise to a man and the

1 P. Wms. 563. (3) Byfield's case, cired by Lord Hale in King v. Melling, 1 Ventris, 231. (4) Per Lord Hale, 1 Ventr. 230. (5) Blamford v. Blamford, 3 Bulf. 103.

Barker v. Giles, 2 P. Wms. 201. Haws v. Haws, 3 Atk. 524. 1 Vez. 14.

body out of which heirs shall issue, the word body. though most properly descriptive of an estate tail, is not required even in a deed; for "the example that the St. of W. 2. putteth, hath not these words de corpore, but words haredibus, viz. cum aliquis dat terram fuam alicui viro & ejus uxori, & hæredibus deipsis viro & muliere procreatis." If lands be given to B. & haredibus quos idem B. de prima uxore sua legitime procrearet, this is a good estate in special tail, albeit he hath no wife at that time, without the words de corpore; fo it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man et bæredibus de carne sua, or to a man et hæredibus de se. In all these cases these be good estates tail, and yet the words de corpore are omitted. Co. Lit. 20. b. But though words of procreation be necessary to create an estate tail in conveyances at common law, yet the intent of the testator, if plain and manifest, will supply them in a devise. Co. Lit. 9 b. 27. a. and even an estate limited in fee, as to A. and his heirs, may be, as already

the heir of his body, though in the fingular number, is an estate tail (m). For heir is nomen operativum & collectivum (n), and chiefly in a will, shall be taken in its full extent, and then it reaches the most remote heir of the body (6). So also a devise to a man, and the children or issue of his body, is an estate tail (7), if he had none at the time to take jointly with him (o).

(6) Clark v.
Day, Cro. Eliz.
313.
1 Bulf. 221.
1 Rolls Ab. 836.
Burley's Cafe,
cited 1 Ventr.
230.

Richards v. Ld. Bergavenny, 2 Vern. 324. Millar v. Seagrove, Robinson's Gavelkind, 96. Trollop v. Trollop, Ambl. 453. (7) Fearne's Con. Rem. 140. Wild's Cafe, 6 Rep. 17.

ready observed, controlled and cut down to an estate tail, if the limitation over for want of an heir be to one who might be the heir of A. See cases referred to p. 66.

- (k) The word iffue in a will is either a word of purchase or of limitation, as will best answer the intention of the testator, though in the case of a deed it is universally taken as a word of purchase. Per Lord Kenyon, Roe v. Collis, 4 Term Rep. 299.
- (1) If the words be so inconsistent that they cannot possibly stand or be reconciled, those words shall be rejected which are least consistent with the general intention of the testator. Haws v. Haws, 3 Atk. 524. I Vez. 14. Perkins v. Bayntun, 1 Bro. Ch. Rep. 118. Doe v. Aplyn, 4 Term Rep. 88. see note (e) B. 2. c. 3. s. 2.
- (m) Unless there be words of inheritance superadded fo as to bring the devise within the reason of Archer's case. See Fearne's Cont. Rem. 140. 3d Ed.

- (n) The word iffue is also nomen collectivum, and takes in all iffues to the utmost extent of the family equally with the word heirs of the body. Per Jus. Rainsford, Warman v. Seaman, Finch's Rep. 282.
- (o) It appears to have been formerly held, that a devise to one and his iffue would give a joint estate to the ancestor and his iffue, if he had iffue living at the time; but as Lord Hardwicke observed, that determination was before it was fully settled, that the word iffue was as proper a word of limitation as heirs of the body." Lamply v. Blower, 3 Atk. 397.

SECTION IV.

AND whenfoever the ancestor by any gift or conveyance takes an estate for life, and after in the same gift or conveyance a limitation is made to his heirs, in see or in tail, the heirs shall not be purchasers (p); and no difference where the law

(p) This rule, which in substance is to be found in numberless cases, is from its being more particularly and formally drawn out and stated in Shelley's case, generally described as the rule in Shelley's case. It might reasonably be expected, that a rule of so great antiquity, and of so frequent and important application, had been long

law creates the estate for life, and when the party (1), or where there is an intervening

(1) P, bus v. Mitford, 1 Veatr. 372.

long fince defined with too much precision, to allow of any difference of opinion amongst the learned in the profession, as to its nature and extent. Its existence is admitted, and fo far as respects limitations of legal estates in conveyances by deed, its prescriptive claim to control feems established; nor is there any difference of opinion as to its giving way to more prevalent principles of construction in marriage articles, but its authoritative controlling force in the construction of wills has led to a controverly, in which we find the most profound abilities anxiously and strenuously opposed. It would lead much beyond the province of a note, to state even the substance of the several decifions and opinions with which the profession have been favored upon this very interesting point, I shall therefore beg to refer to the opinions themselves; Perrin v. Blake, Dougl. Rep. 329, in a note; Mr. Juf. Blackftone's Argument; Hargrave's Law Tracts, 489; Fearne's Effay Cont. Rem. 4th Edit.; Mr. Hargrave's Observations concerning the Rule in Shelley's case, 551; Mr. Butler's note, Co. Lit. 376; Ambrose v. Hodgson, Dougl. 323; Jones v. Morgan, 1 Bro. Ch. Rep. 218; and content myself with enumerating the cases in which the rule has not obtained, and observing upon the feveral points which must concur to render it applicable. The cases in which the rule has not obtained, are brought together by Sir W. Blackstone, and reduced to the following four heads:

1st, Where no estate at all, or (which is the same thing in the idea of our antient law) where no estate of freehold is devised to the ancestor, here the heirs

cannot

vening estate (q), especially if not of free-And as ancestor and heir are corelative

cannot take by descent, because the ancestor never had in him any descendible estate. And this must always be the case where the ancestor is dead at the time of the devise, as in the known case of John de Mandeville, Co. Lit. 26. the heir then taking a vested estate by purchase. It is also the same if the ancestor be living, and has no fort of estate devised to him, only that then the estate of the heir is contingent, because nemo est hares viventis: And if the ancestor has only the devise of a chattel interest, with a subsequent estate to his heirs, the heirs must likewise take as purchasers, or not take at all: For, if between the term of the anceftor and the effate to his heirs there is no vefted freehold remainder, the heirs can only take by way of executory devise, which ex vi termini, implies an estate not executed in the ancestor; or if there be any such vested estate of freehold interposed between the ancestor's term and the contingent remainder to his heirs, that contingent remainder is supported intirely by the interposed estate, and does not derive its being, or any degree of affistance from the chattel estate of the ancestor. That the rule does not apply to this class of cases, is evidently referable to the ancestor's not taking an estate of freehold, upon which word taking, it may be proper to observe that it seems immaterial, with refpect to the general rule, whether the ancestor take the freehold by express limitation or by implication. Pybus v. Mitford, 1 Vent. 372.

2d. The next case is, where no estate of inheritance is devised to the heir, as in the case of White and Collins, Com. Rep. 289. There the devise was to Frank

Mildmay

relative as to inheritance, so are testator and executor as to chattels (2); and therefore

(2) Co. Lit. 54. Wentworth's Office of Executor, 300.

Mildmay for life, with a power of jointuring, and after his death (and jointure, if any be) to the heir male of his body lawfully begotten, during term of his natural life, remainder over. Common fense will here tell us, that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir.

3d, The third case is, where some words of explanation are annexed by the devisor himself to the word heirs in the will, whereby he discovers a consciousness, diffrust, or apprehension that he may have used the word improperly, and not in its legal meaning; and therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. Thus in Burchel and Durdant (2 Vent. 311. Ca. th. 154) the devise was "in trust for Robert Durdant for life, and after his decease to the heirs male of his body now living;" as if the testator had said, I do not mean a perpetual succession in the male line of Robert Durdant, which perhaps may be the legal fense of heirs male of his body, but I mean by that expression, only such of his fons as are at present born and known to me; and accordingly the Court held that George Durdant, the fon of Robert, and living when the will was made, should take the estate as a purchaser; so in Liste and Gray (2 Lev. 223.) the words were "to Edward for life, remainder to his 1st, 2d, 3d, and 4th fons in tail male, and so to all and every other the heirs male of the body of Edward." Which words "and fo" (together with the manifest reason of the thing) plainly shewed

therefore a remainder of a term to the executor vests in the testator (r). Nor will

shewed that the "other heirs male of the body" in the fubsequent clause of the will, were to be understood as the 1st, 2d, 3d, and 4th fons" were to be underflood in the preceding. And in Lowe and Davis (Lord Raym. 1561.), when the testator had first devised in a loofe unguarded manner to "his fon Benjamin, and his heirs lawfully to be begotten," he immediately recollected himfelf, and adds by way of explanation, "that is to fay, to his Ist, 2d, 3d, and every other fon and fons fucceffively, lawfully to be begotten of the body of the faid Benjamin, &c." This devise to the heirs thus explained was held to be by way of purchase; so in the case of Doe on dem. of Long v. Laming. (2 Burr. 1100.) the devife was of gavelkind lands " to Ann Cornish and the heirs of her body begotten, as well female as male, to take as tenants in common." Now fince gavelkind lands cannot descend to heirs female as well as males (as is expressly declared by the statute de prærog. regis, 17 Ed. 2. c. 16.) nor can heirs as fuch be tenants in common, but coparceners; it is clear that by the words heirs of the body (thus explained by the words female as well as male, and to take as tenants in common) the devisor could only mean the children of Ann Cornish.

4th, The last case wherein heirs of the body have been held to be words of purchase, is where the testator hath superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gives the estate; whereby it appears, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent, and were not confidered

I.

r

e

d

is

d

3,

y

ı,

if

0

5,

0

IS

...

e

S

is

1-

IS

e

e

1-

ľ

S

e

d

will the intention, though in express words, control the operation of the law upon

fidered merely as branches derived from their own progenitor. Where the heir is thus himfelf made an ancestor, it is plain, that the denomination of heir of the body was merely descriptive of the person intended to take, and means no more, than "fuch fon or daughter of the tenant for life as shall also be heir of his body." The cases of Lisle v. Gray, Lowe v. Davis, and Long v. Laming, fall under this head, as well as the other; these having also words of limitation fuperadded to the word heirs, as well as the explanatory words I before took notice of. Thus, too, in Cheek v. Day, (which, as Lord Raymond observes, Fitz. 24. Fortesc. 77, is the true name of the case usually called Clerk v. Day,) the devise, as there cited from the roll, was, " to my daughter Rose, for life; and if the marry after my death, and have any heirs lawfully begotten, I will that her heir shall have the lands after my daughter's death, and the heirs of fuch heir." So likewise Archer's case, 1 Rep. 66, is, "to the right and next heir of Robert Archer, (the tenant for life), and to the heirs of his body lawfully begotten, for ever." And the case of Backhouse v. Wells, 2 Wms. 476, is, "from and after the decease of the tenant for life, to the issue male of his body, and to the heir male of fuch iffue male. It may be material to remark, that there is another class of cases, in which the rule in Shelley's case appears not to have obtained, namely, where from the different qualities of the estates limited to the ancestor and his heirs, (as where a legal estate is limited to the ancestor, and an equitable or trust estate to the heirs,

upon the words expressed (s); as where the ancestor has an estate for life given to him

or an equitable or trust estate to the ancestor, and a legal estate to the heir,) they will not unite and incorporate, fo as to vest the subsequent limitation in the ancestor. Tippin v. Cosin, Carth. 272. Jones v. L. Say and Scale, 8 Vin. Ab. 262. c. 19. Before I conclude this note, it may be proper to notice, that the rule requires the limitations to the ancestor and heir to be in the same gift or conveyance; fo that if there be a limitation to a man's heirs in a deed, and he afterwards, by other means becomes feised of the freehold, in this case the two estates will not be united in him. Moor v. Parker, Ld. Raym. So if there be tenant for life, and afterwards the reversion, by some other conveyance, be limited to his heirs, fuch limitation will not be executed in him. Skin. 559. 4 Mod. 319. Clifton v. Jackson, 2 Vern. 486. Key v. Gamble, T. Jones, 124. Snow v. Cutler, 1 Lev. 135. Raym. 162. But if an estate be limited to one for life, by deed, and there be afterwards a limitation in his life-time to the heirs of his body, under an execution of a power of appointment conferred by the fame deed, as a limitation to the use of A. for life, and after his decease, to such uses as B. shall appoint, who afterwards, in A.'s life, appoints to the use of the right heirs of A.; it does not appear to have been judicially determined, whether the limitations unite according to the general rule, or whether the latter limitation operates by way of contingent remainder to the heir; Mr. Butler merely inclines to think the limitations will unite. See Co. Litt. 299. b. note (1). But Mr. Fearne conceives that

him expressly, a limitation after to his heirs, or to the heirs male of his body, puts the

that the objections which affect Mr. Butler's mind, are capable of being obviated by an attentive confideration of the principles on which the question turns. By the terms of the rule, "mediately or immediately," the intervention of another estate between the limitations to the ancestor and his heirs, does not prevent the fubfequent limitation from vesting in the ancestor. See Colson v. Colson, 2 Atk. 247. But, upon this point, a very material confideration occurs. If the subsequent limitation to the heirs, &c. vesting in the ancestor, where he takes a preceding estate of freehold by the same conveyance, were absolutely to merge the particular estate of freehold; it would follow, that where the limitations intervening between the preceding freehold, and fuch subsequent limitation to the heirs, &c. are contingent, their union would destroy the intervening limitation; therefore the two limitations are united and executed in the ancestor only, until fuch time as the intervening limitations become vested, and then open, and become separated, in order to admit fuch intervening limitations, as they arife. Thus, where there was a limitation to baron and feme, for their lives, remainder to the first and other fons of the marriage fuccessively, in tail; remainder to the heirs male of the bodies of the baron and feme; the Court refolved, that it was an effate tail executed in the baron and feme, sub modo; that is, fo as not to merge the effates for life, abfolutely, but executed only till the birth of the first fon; and that then the estates should become divided, by operation of law, and the baron and feme become tenants

(3) Archer's Case, 1 Rep. the estate of inheritance in himself; otherwise, perhaps, of heir male only in the singular number, especially if there be words of limitation after it (3). And though there be a difference in words, when the land of freehold is devised to one for life, the remainder to his heirs, mediately or immediately; and where a term is so

for their lives, with remainder to their first and other sons, remainder to the baron and seme, in tail. Upon which distinction it has been held, that if the intervening limitation be merely contingent, and the contingency does not happen, though it possibly might have happened during the particular estate, the widow would be dowable. Hooker v. Hooker, Rep. Temp. Hardw. 13. But if such intervening limitations were vested by the contingency happening or vested in their creation, the widow would not be dowable. Duncombe v. Duncombe, 3 Lev. 437.

- (q) I have, in the above note (p), referred to the difference where the intervening effate is vested, and where a contingent limitation.
- (r) This point appears to have been admitted in Dyer, 309. Yelv. 85. But see Sparke v. Sparke, Moor, 666. contra. See also Cranmer's Case, 2 Leon. 6. 3 Leon. 20.
- (s) See Mr. Hargrave's observations on the rule in Shelley's Case, and Mr. Fearne's Essay Cont. Rem. 300, 301.

devised, the difference is in words only, for the testator's meaning is the same, $\mathfrak{C}_c(t)$.

(t) In the case of Peacock v. Spooner, 2 Vern. 195. the words heirs of the body were allowed, in the affignment of a term, to prevail as words of purchase, notwithstanding a prior limitation to the ancestor for life. So also in Dafforne v. Goodman, 2 Vern. 362. But the authority of these cases is materially shaken, and is only attended to in cases exactly the same in Specie. Webb v. Webb, I P. Wms. 132. Garth v. Baldwin, 2 Vez. 660. It may, therefore, be flated as a general rule, that whatever words would, in the disposition of real estate, give an express estate tail, or fuch estate by implication, will, in the disposition of a chattel real or personalty, carry the whole interest. Webb v. Webb, I P. Wms. 131. Seale v. Seale, I P. Wms. 289. Atkinfon v. Hutchinfon, 3 P. Wms. 259. Dod v. Dickinson, 8 Vin. Ab. 451. pl. 25. Fereys v. Robertson, Bunb. 301. Butterfield v. Butterfield, I Vez. 133, 154. Saltern v. Saltern, 2 Atk. 376. E. of Chatham v. Tothill, 6 Bro. P. C. 450. Garth v. Baldwin, 2 Vez. 660. are authorities in which words, which would have paffed an express estate tail, have been held to give an absolute interest in a chattel or personalty. And Burford v. Lee, 2 Freem. 210. Anon. 2 Freem. 287. Green v. Rod, Fitzgib. 68. are direct authorities to shew, that the fame conftruction applies to words which create an effate tail by implication only. See Fearne's Essay Ex. Dev. 363; et seq. But, though such be the general rule, it shall not prevail, if, from any expression in the will, the testator appear to have intended the heirs or iffue to take by purchase. Warman v. Seaman, Finch's

Finch's Rep. 279. Clare v. Clare, Forrest. 21. Hodgfon v. Buffey, 2 Atk. 89. Doe v. Lyde, I Term Rep. 593. See also Beauclerk v. Dormer, 2 Atk. 312. Knight v. Ellis, 2 Bro. Ch. Rep. 570.

SECTION V.

(1) Duke of Norfolk's Cafe, 3 Ch. Ca. 48.

THERE ought also to be one universal rule of property in the realm, the fame in Chancery (1) as at common law (u). And therefore the rules to prevent perpetuities (x) are the policy of the kingdom,

- (u) And therefore limitations of estates, whether by way of truft, or by estate executed at common law, are to be governed by the same rule. See b. I. c. 6. f. 7, 8. and the cases there referred to.
- (x) A perpetuity is where, though all who have interest should join in a conveyance, they could not bar or pass the estate. Washbourn v. Downs, 1 Ch. Ca. 213. See also Duke of Norfolk's Case, 3 Ch. Ca. 35. Various have been the attempts to establish perpetuities, by controlling the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are brought together by Mr. Knowler, in the case of Taylor on dem. of Atkins, v. Horde, I Burr. 84, who observes,

2

kingdom, and must take place in a court of equity, as well as in courts of law (2); and it is an undeniable reason against any settlement: so that there can be no such thing as a perpetual limitation of a free-hold. And if there be a devise over to a charity, in case he go about to alien, it will not avail, or make the condition good

(2) Duke of Norfolk's Cafe, 3 Ch. Ca. 48. Chudleigh's Cafe, 1 Rep.

that the power to fuffer a common recovery is a privilege inseparably incident to an estate tail. It is a potestas alienandi, which is not restrained by the statute de donis, and has been so confidered ever fince Taltarum's Case, (12 E. 4. 14 b. pl. 16.); and this power to fuffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. Ift, That it cannot be restrained by condition, appears by Co. Litt. 223, 224, and Sonday's Case, 9 Rep. 128. But this doctrine does not extend to a feoffment, a fine at common law, or any other alienation, which works a discontinuance, and is therefore confidered in the law as tortious; a provifo, therefore, restrictive of such mode of alienation, may be annexed to an effate tail, either as a condition to determine the estate, and give the donor and his heirs a right of re-entry, or by way of limitation, to make the estate of the tenant in tail cease, and the lands remain over to a third person. See Mr. Butler's note (1), Co. Litt. 223. b. Pearce v. Win, 1 Ventr. 321. 2dly, That it cannot be restrained by limitation, appears by Cro. Jac. 696, Foy v. Hinde, and by Sonday's cafe. 3dly, That it cannot be Vol. II. re(3) Company or Pewterers v. Christ's Hofpital, 1Vern. 161. (4) Humberston, v. Humberston, 2Vern. 738. 1P. Wms. 332. Gibb. U(cs, 77. good (3). However, where the will is directory, there ought to be a strict settlement made (4), and the intent followed, as far as the rules of law will permit (y).

restrained by custom, appears by the case of Taylor v. Shaw, Carter 6 and 22. 4thly, That it cannot be restrained by recognizance or statute, appears by Poole's case, cited in Moore, 810. 5thly, That it cannot be restrained by covenant, appears by the case of Collins v. Plumer, 1 P. Wms. 104. 6thly, That an attempt to suffer a common recovery cannot be restrained, appears by Corbet's Case, 1 Rep. 83. Mildmay's Case, 6 Rep. 40. Pierce v. Win, 1 Ventr. 321. And 7thly, That a conclusion or agreement to suffer a common recovery cannot be restrained, appears by Mary Portington's Case, 10 Rep. 35.

(y) In the case referred to, the limitation was decreed to be to the first fon unborn, in tail; whereas, if the limitation had been fo framed, as to suspend the right of alienation of the estate, as long as the law would allow, the limitation might have been made dependent on such unborn son attaining twenty-one: and in the case of Vaughan v. Burslem, 3 Bro. Ch. R. 101, Lord Thurlow, C. observed, that he knew no instance in which the conveyance had been carried to the utmost extent of what the law might do. But fee Gower v. Grosvenor, Bard. 54. D. of Newcastle v. Countess of Lincoln, 3 Vez. Jun. 387. As to the general question, What estate a child must take under a limitation to him before his birth? fee Godolphin v. Godolphin, 1 Vez. 21. Hucks v. Hucks, 2 Vez. 568. Chapman

Nor can a devise direct an inheritance to descend against the rules of law (5), as to the heirs male in see; for what could not be made valid by any act executed in his life-time, cannot be good in a devise; and therefore a term limited to a man and his heirs shall go to the executors (6). So a will, in *Dutch* or *Latin*, or any other language, respecting lands in *England*, must be so framed, as to pass the estate(2) according to the rules of our law (7); for a will or other act of the party cannot rule the law, but the law rules them.

r

rc

e-

'S

ens

to

p-

ſe,

y, e-

le-

as,

aw

e : .h.

ew

ed

But the the der v. 58. (5) Co. Litt. 25. a.

(6) Duke of Norfolk's case, 1Vern. 164.

(7) Bovey v. Smith, 1Vern. 85.

Chapman v. Brown, 3 Burr. 1626. Fearne's Essay Ex. Dev. 391, 392.

(2) Nor will the circumstance of the will being made abroad, if of lands in *England*, make any difference; for being of lands in *England*, if they pass by will, they must pass by such a will, and so authenticated and attested, as the laws of *England* require. Coppin v. Coppin, 2 P. Wms. 293. The law of the place in which the disposition of it happens to be made, being in this particular controlled ratione rei sta. See B. 5. c. 1. s. 2.

SECTION VI.

BUT so long as it may be made consistent with the rules of law, the devise shall not be impeached. And, therefore, although a freehold cannot be granted in futuro, by a conveyance (a) in his lifetime;

(a) This must be understood by conveyance at common law; for though, by conveyance at common law, the freehold necessarily passes out of the grantor, and therefore requires some person in being, in whom it can immediately vest; yet such necessity does not exist in cases of conveyances under the statute of uses, trusts in equity, or grants of rents de novo; for in neither of these cases is the freehold for an instant in abeyance. For, as to conveyances under the statute of uses, till there is some person in being in whom the use can vest, the possession is not altered, but continues in the feoffor and his heirs, Co. Litt. 23. (unless the feoffor has expressly limited to himself a less estate, in which case the limitations over for want of a preceding freehold would be void. Rawley v. Holland, 2 Eq. Ca. Ab. 753. See also Fearne's Cont. Rem. 4 ed. 50, 51.) As to executory trufts, the legal effate immediately vests and continues in the trustee; and as to rents de nove, the tenant continues in possession of the land out of which they issue. However, it is to be observed, that in cases of wills, uses, and trusts, if it be inconsistent with the estate, expressly declared, that the freehold should remain

time; yet where a man in his will gives a future estate to arise upon a contingency, and does not part with the see at present, but retains it, this is not against law (b). For,

with the party, as if he has a term of years expressly given him, the law will not give him by implication an estate of freehold. Adams v. Savage, 2 Salk. 679. Rawley v. Holland, 2 Eq. Ca. Ab. 753. Fearne's Cont. Rem. 31. Mr. Butler's note (2), Co. Litt. 216.

- (b) Such a disposition of lands is termed an executory devise, which Mr. Fearne defines to be strictly a limitation of a future estate, or interest in lands or chattels, (though, in the case of chattels, it is more properly an executory bequest,) which the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. Effay on Executory Devises, 298. An executory devise differs from a remainder in three very material points. 1st, It needs, not any particular estate to support it. 2d, By it a fee fimple, or other less estate, may be limited after a fee simple. 3d, By this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. To which may be added a fourth distinction, that, after an executory devife, all other fubsequent limitations are also executory; whereas a remainder may be vested after a contingent remainder, if fuch contingent limitation do not carry the whole fee,
- 1. "The first case happens, says SirW. Blackstone, when a man devises a future estate to arise upon a contingency, and till that contingency happens, does not dispose

For, by the common law, one might devise that his executor should fell his land, and in such case the vendee is in by the will.

dispose of the see simple, but leaves it to descend to his heir at law; as if one devises land to a feme sole and her heirs upon her day of marriage, here is in effect a contingent remainder, without any particular effate to support it, a freehold commencing in future. This limitation, though it would be void in a deed, yet it is good in a will by way of executory devife. For fince by a devise a freehold may pass without corporal tradition or livery of feifin, (as it must do if it passes at all,) therefore it may commence in futuro, because the principal reason why it cannot commence in futuro in other cases is the necessity of actual seisin, which always operates in prasenti. And since it may thus commence in futuro, there is no need of a particular estate to support it, the only use of which is to make the remainder by its unity with the particular estate a present intereft."

- 2. "By executory devise, a see or other less estate may be limited after a see; and this happens where a devisor devises his whole estate in see: but limits a remainder thereon, to commence on a suture contingency, as if a man devises land to A. and his heirs, but if he die before twenty-one, then to B. and his heirs; this remainder, though void in a deed, is good by way of executory devise."
- 3. "By executory devise, a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed.

For

will, and the fee descends to the heir in the mean time (1); and of the same nature with these are springing uses (c). But as

(1) Scatterwood v. Edge, 1 Salk. 229.

For by law, the first grant of it to a man for life was a total disposition of the whole term, a life estate being esteemed of a higher and larger nature than any term of years," 2 Bla. Com. 173.

It is observable that the learned commentator in the above illustrations of the nature of the first and second kinds of executory devises, states them to be limitations which could not take effect by deed, without diffinguishing deeds which operate by the rules of the common law, from fuch as operate by way of use, an omission the more remarkable, as he afterwards observes, that the indulgence allowed to executory devifes, when devifes by will were again introduced, was adopted from the favourable construction allowed to declarations of uses. 2 Bla. Com. 334. With respect to his observation, that after the limitation of a term to one for life no remainder could be limited over by deed, it feems material to remark that even in a deed fuch limitation over will be good, if by way of truft. See B. 1. c. 4. f. 2. note (f), Fearne's Ex. Dev. 304, 407,

(c) A springing use is an use limited to arise upon some particular contingency; it differs from a contingent remainder, 1st, That though there must be a preceding vested estate, yet a preceding particular estate of freehold is not necessary to support it. It differs from an executory devise in this, that there must be a person seized to such use when the contingency happens, or it cannot be executed by the statute; there-

fore

for fpringing uses, like executory devises, they are either present or future. If present,

fore if the cestuique use in tail by discontinuance, or the feoffee to uses, or the person out of whose seisin, the use is to be served by alienation or otherwise, destroy his estate or his possibility, the use is destroyed for ever. 1 Rep. 134. Cro. Eliz. 439. Whereas by an executory devise the freehold itself is transferred, and there needs no person to be seised to execute an estate in the devisee. Gilb. Uses, 127. 2dly, It further differs from a remainder, as no remainder can be limited by the act of the party upon or after a fee. Co. Litt. 18. Whereas a fee may be limited determinable upon a contingent event by way of shifting use. Bro. Feoffment al. Uses. Stat. 6. Ed 6. 1 Roll's Ab. 415. Lloyd v. Carew, Pre. Ch. 72. Show. P. C. 137. Pells v. Browne, Cro. J. 590. Sanders on Uses, 187. & seq. A remainder being a remnant of an estate in lands or tenements expectant on a particular estate, created together with the same, at the same time must wait for, and only takes effect on the regular expiration and determination of the particular estate, it cannot be fo limited as to defeat or abridge the particular estate. Fearne's Cont. Rem. q. & seq. Butler's note (1), Co. Litt. 203. b. But a preceding particular estate may be abridged and determined by way of secondary use, as if the limitation be to A. for life in tail or in fee, provided, that where C. returns from Rome it shall thenceforth remain to the use of B. in fee. Butler's note (1), Co. Litt. 203. b. Mr. Sanders however fubmits, that a difference should be made between those cases where the grantor only parts in the first instance with an estate less than the fee, fuch

fent, the party must be in esse & capax at the time; for it shall take essect according to

fuch as a plain gift in tail, or leafe for life; and those where the grantor departs with the whole fee, thereby transferring a seisin to the grantee, to serve uses limited to create particular estates, such as a feoffment in fee, to the use of B. in tail, or for life, provided, when C. returns from Rome, it shall then be to the use of C. For in the former case, in order to make the estate cease before its regularly and legally appointed period, and go over to another, there should be regular words of limitation, expressive of the intention of the parties, in which case the remainder is said to take effect by way of conditional limitation. The words of limitation are, fo long, while, or until: when these words are used, then immediately upon the contingencies happening the estate of the grantee ceases, and the next fubsequent estate vests; but if mere words of condition, then the estate limited upon such condition, to go to a third person, will be void as a remainder, and as a conditional limitation. These words of condition are generally upon condition to that, or provided. Therefore if a leafe for life is made upon condition, that if a stranger pay the lessor 20%, then immediately the land shall remain to the stranger. This, as a condition to give the stranger entry, is void, being an abridgment of the particular estate; there being also express words of condition, it cannot enure as a conditional limitation; and as a springing use it can never arise, for to create a springing use there must be a fufficient feisin in some one to serve it when it comes in ese; but here there is no seisin to serve the shifting use, for the lessee has only a seisin to serve the use implied

to the intent, or not at all. As a feoffment to the right heirs of B. is not good as to a springing use; because it is by way of present limitation, et non est hæres viventis; Otherwise is it were suture, as to the right heirs of B. after his death (d), & sic nota diversitatem inter verba de præsenti, & verba de

plied to himfelf, and when his effate for life is determined, the feifin to serve the uses is determined also. But if a feoffment had been made in fee to the use of A. for life, and if B. do fuch a thing, then to the use of B. in fee, the use to B. will take effect in abridgment of the estate for life of A. Sanders on Uses, 183, 184. 3d, An executory or springing use differs from a contingent remainder in this further particular, that as cestuique use for life cannot as such be seised to the use, but the seisin to serve it when it comes in este, must be independent of such estate for life, the cestuique use for life cannot by forfeiture of his life estate wholly destroy the contingent springing use. See Chudleigh's Case, 1 Rep. (but quere, Whether the person seised must not enter to restore the use? See Sanders on Uses, 224, 225. Fearne's Essay Con. Rem. 220, et seq.) Whereas a contingent remainder, unless protected by a general trust, or by trustees interposed for the purpose of preserving it, or by an invervening vested remainder, may be defeated by tenant for life. Archer's Case, 1 Rep. 66. Loddington v. Kime, Ld. Raym. 203. Denn v. Puckey, 5 Term Rep. 209.

⁽d) The two first cases referred to are authorities in support of such a distinction, but they seem to be very materially

de futuro (2). 2dly, If future, they must (2) Goodrightv. Cornish, 1 Salk. arise within a reasonable time (e); as a feoffment

Scatterwood v. Edge, 1 Salk. 229 See alfo

Moor v. Parker. 1 Ld. Raym. 37. Goodman v. Goodright, 2 Burr. 873.

materially shaken, if not over-ruled, by the modern cases of Harris v. Barnes, 4 Burr. 2157, and Doe v. Carlton, I Wilf. 225. It was also formerly doubted whether a devise to an infant in ventre sa mere was good or not, though it was admitted that a devise to an infant when he should be born was good. Snow v. Cutler, I Lev. 135. But it is now clearly agreed that a devise to an infant in ventre sa mere is good, Taylor v. Bydell, I Freem. 243. Anon. 293. Gulliver v. Wickett, 1 Wil. 106. Chapman v. Bliffet, Forrest. 145. But the court will not conftrue a will to extend to persons not in being, unless the testator shew such to be his intention by words in the will. Ellison v. Aircy, 1 Vez. 111. Pearson v. Garnett, 2 Bro. Ch. Rep. 47. Cooper v. Forbes, 2 Bro. Ch. Rep. 63. Bennet v. Honywood, Ambl. Rep. 708. The inference to be drawn from the cases upon this point, seems to be, as stated by Mr. Fearne, that whatever force is to be allowed to the distinction between executory limitations per verba de prasenti, et per verba de future, it can affect only those cases where there is not the least circumstance from which to collect the testator's intention of any thing elfe, than an immediate devise to take effect in prasenti. Essay on Executory Dev. 431, 432.

(e) Every future interest, springing or secondary use, or trust executory, must be so limited, as necessarily to take effect, if at all, within a life or lives in being. and twenty-one years and some months over; a period which. feoffment to the use of A. after the death of B. without issue, within twenty or thirty years,

which, Mr. Hargrave observes, was not arbitrarily preferibed by our courts of justice, but wifely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail by fine or recovery for a longer space. Co. Litt. 20. a, note (5). The fame analogy has been observed with respect to secondary sees, when limited upon an estate But the reason which induced the in fee simple. courts to adopt this analogy with respect to those estates when limited upon an estate in fee simple, does not hold when they are limited upon or after an estate tail, because, when they are limited upon or after an estate tail, the tenant in tail, by fuffering a common recovery before the event takes place, bars or defeats the fecondary estate, and acquires the fee simple absolutely discharged from it. See Mr. Butler's note, Co. Litt 274 b. Fearne's Ex. Dev. 314. Whence it might be inferred that a fpringing or fecondary use, if limited on an estate in fee simple, cannot be barred or otherwise defeated, an inference by no means correct. For though it be true, that an executory devise limited on a fee cannot be barred or defeated, as determined in Pells v. Brown, Cro. Jac. 592; yet a springing or secondary use may, as already observed, be defeated before the use arise by the destruction of seisin, out of which the future use is to take effect, as by a feoffment upon a good confideration, and without notice; Wood v. Reynolds, Cro. Eliz. 764, 765, or by a devise of the land, Moor, 731. Gilb. Uses, 125; Sanders on Uses. Subject to this exception it may be taken as true, that a fpringing

years, or the compass of a life or lives, is good, as a springing use (3), and the whole estate remains in the seossfor (f) in the mean time (4); for let there be ever so many, it is but one life, and must have an end. But a springing executory use, after a dying without issue (5) the law will not allow (g). Nor can it be limited after

(3) Duke of Norfolk's Cafe. Lloyd v. Carew. Pre. Ch. 72. Stephens v. Stephens, Forreft. 228. but fee E. of Stamford v. Sir John Hobart, 1 Bro. P. C. 288. Woodford v. Thelluffon, Ch. E.T. 1799. Long v. Blackill. (5) Lidy Lanes-Doe v. Fonnereau,

7 Term Rep. 100. (4) Davis v. Speed, Carth. 262. Skin. 352. borough v. Fox, Forreft. 262. Goodman v. Goodright, 2 Burr. 877. Dougl. Rep. 487.

a fpringing or fecondary use cannot be defeated, if limited upon, or after an estate in fee simple.

- (f) And in the case of an executory devise, if the freehold and inheritance in the mean time be not disposed of, they descend to the testator's heir at law. Pay's case, Cro. Eliz. 878. Clark v. Smith, Lutwyche, 793. Gore v. Gore, 2 P. Wms. 28. Fearne's Ex. Dev. 432. so if an estate be devised upon a suture contingency, and not intermediate disposition of the rents and profits, it is a resulting trust for the heir, Attorney General v. Bowyer. 3 Vez. 725.
- (g) A limitation to take effect after an indefinite failure of iffue is certainly void, as well by way of fpringing use as of an executory devise; but, in the confiruction of wills, courts of law and equity will anxiously avail themselves of any expression by which the limitation may be restrained, and made to depend on a default of issue living at the time of the death of the devisees in tail. See Porter v. Bradley, 3 Term Rep. 143. Daintry v. Daintry, 6 T. Rep. 307. But if the limitation

after a fee; for after such a disposal, nothing remains in the owner to limit. But there may be two concurrent contingencies, and not expectant one after the other (h); as where the devisor parts with the

limitation, after an executory devise in tail, be so framed as to take effect, either in lieu of the preceding executory devise, if that sail, or as a remainder to depend upon it, if it take effect, it is good. See Gore v. Gore, 2 P. Wms. 28. Brownsword v. Edwards, 2 Vez. 243. Doe v. Fonnereau, Dougl. Rep. 470. Fearne's Ex. Dev. 339.

(b) Such limitations are fometimes called limitations on a contingency, with a double aspect; sometimes limitations on a double contingency; and fometimes concurrent or contemporary limitations. Upon the fecond and third of which denominations, Mr. Douglas observes, that there are other limitations on a double contingency; as where an estate is limited to A. for life, remainder to B. in tail, remainder to C.; here the time when C.'s estate shall vest in possession, depends on a double contingency. 1. If B. die without issue before A., it will vest immediately on the death of A. 2. If B. outlive A., it cannot vest till after the estate tail in B. is at an end: And, as to the third denomination, he observes, they certainly are not aptly described by the words concurrent or contemporary; fuch epithets being rather expressive of estates which take effect at one and the same time. Note (2), Doe v. Fonnereau, Dougl. Rep. 504., 8vo. ed. But though two or more feveral contingent fees

I,

)-

t

-

e

h

e

(o

g

2

15

S

25

ic

1.

1,

-

e

e

e

-

f

١.

the whole fee simple, but upon some contingency qualifies that disposition, and limits another see, which is altogether new in law (6). And the ultimum quod sit of a see upon a see in the limitation of an use is not yet plainly determined. It may be extended surther than a life or lives, as to a year after (i); and the true rule is to stop

(6) Loddington
v. Kime,
11.d. Raym.203
1 Salk. 224.
Doe v. Holme,
3Wilf.237.241.
2Bla. Rep. 777.
Goodright v.
Durham,
Dougl. Rep.2658vo. ed.
Denn v. Puckey

5 Term. Rep. 299. Fearne's Effay, Cont. Rem. 292, 293.

may be limited concurrently by will or by deed, by way of use, (Lloyd v. Carew, Pre. Ch. 72.) so as to be substitutes or alternatives, one for the other, and not to interfere, yet one only can take effect; for every such contingent limitation is only a disposition, substituted in the room of the others, upon the event of their failing. Fearne's Cont. Rem. 293. Such limitations, however, may, if contingent remainders of freehold, and not protected by trustees, (not so of copyhold,) be barred by a recovery suffered by a tenant for life. See Loddington v. Kime, I Ld. Raymond, 203. Denn v. Puckey, 5 Term Rep. 299. Doe v. Burnsall, 6 T. R. 30.

(i) Lord Talbot, C. in the case of Stephens v. Stephens, Forrest. 228., held an executory devise, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, to be good; and the authority of this decision has been recognized in a variety of cases. And as the doctrine of executory devises is to be referred to the indulgence afforded by the courts of law, prior to the statute of

(7) Lloyd v. Carew. Pre. Ch. 74. D. of Nortolk's Cafe, 3 Ch.Ca. 31. 36.

(8) Chudleigh's Cafe, 1 Rep. 138 See b. 2. c. 6.

(9) Purefoy v. Rogers, 2 Saund. 380. Fearne's Ex. Dev. 299. 420. Southby v. Stonehouse, 2 Vez. 616.

stop when it proves inconvenient (7). Nor is there any danger of a perpetuity from these uses, as from executory devises; for all uses, as well in esse as otherwife, may be destroyed by the alteration of the estate to one against whom the remedy fails in equity, there being no confidence expressed or implied (8); but every executory devise is a perpetuity, as far as it goes, that is, an estate unalienable, though all mankind join in a conveyance (k); and it is to be remembered, that as an executory devise is never after a freehold, but is construed a contingent remainder (9), because it is admitted only for the necessity, and to support the in-

wills, in the construction of declaration of uses, it follows, that a fecondary shifting use may be effectually limited, if to arise within the same period. See Fearne's Cont. Rem. 321. Massenburgh v. Ash, 1 Vern. 234. 257. 304. Long v. Blackall, 7 T. Rep. 100. Woodford v. Thellusson, E. T. 1799, Ch.

(k) That an executory devise cannot be barred without the concurrence of the person entitled to take benefit under it, may be admitted; but that, though all persons interested in the executory devise will come in as vouchees, the executory devife cannot be barred by fuch concurrence, is a position at least doubtful. See

Pells

tent (1), as after a term for years, or the like, upon which a contingent remainder cannot depend, by reason of the abeyance of the freehold; so there is the same between a suture use, and a contingent remainder by way of use (10.)

(10) See Goodtitle v.Billington Dougl.Rep. 729.

Pells v. Brown, Cro. Jac. 590. Fearne's Ex. Dev. 307.

(1) Though, whenever a contingent limitation be preceded by a freehold capable of supporting it, it is confirued a contingent remainder, and not an executory devise, yet as it is possible that the freehold so limited may, by fubfequent accident, become incapable of ever taking effect, (as by the death of the first devifee in the testator's life-time,) in which case the subfequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death, (that is, at the time when the will is to take effect,) as if it had been limited without any preceding freehold; now, in this case, it has been held, that where fuch subsequent contingent limitation could not vest at the testator's death, it shall enure as an executory devise, rather than fail for want of that preceding freehold which had never taken effect. Hopkins v. Hopkins, 1 Atk. 582. Forrest. 44, and cases there cited. Brownsword v. Edwards, 2 Vez. 249. But when a preceding freehold has once vested, no subsequent accident will make a contingent remainder enure as an executory devise. Fearne's Ex. Dev. 420.

CHAP. IV.

Of the Limitation of Uses where the Intent does not appear.

SECTION I.

DUT further, where the intent of the parties does not specially appear, it is intended to agree with the rules of law (1). And therefore the Chancellor, in case of an use, often (a) adjudged by imitation of the rules of law, and according to the nature and quality of the land; as in case de possessione fratris, Borough-English, gavelkind, lands on the mother's fide, &c. (2). For Chancery will confult with the rules of law, where the intention of the parties does not specially appear. 127. 2 Rolls Ab. 780. Banks v. Sutton, 2 P.Wms. 718. Cowper v. E. of Cowper, 2 P.

Taylor v. Bydell, 1 Freem. 143. Bowes v. Blackett, Cowp. Rep. 240.

(2) Co. Litt. 13. a. 14. b. Beckwith's Cafe, 2 Rep. 58. Chudleigh's Cafe, 1 Rep. Wms. 73.

> (a) The instances in which Chancery did not adopt the rule of law, are pointed out by Lord Bacon in his Reading on the Statute of Uses, (8vo edit. p. 308.), and referred to the difference between uses and the land itself, or, as he expresses himself, between uses and cases of possession.

So the widow of the cestuique trust of a copyhold estate, ought to have her free bench or widow's estate, as well as if the husband had had the legal estate in him (b). And there it may be faid, that æquitas fequitur legem. So a tenant by the curtefy shall be decreed of the trust (c), as well as of a legal estate (3). But dower (d) is not (3) Sweetapple v. Bindon, allowed out of a trust estate (4) of inhe- 2Vern. 536. Casborne v. ritance,

Watts v. Ball, 1 P. Wms. 108. (4) Colt v. Coll, 1 Ch. Rep. 254. 134. 3d ed.

- (b) This doctrine, though distinctly stated in Otway v. Hudson, 2Vern. 585, and recognized by Sir J. Jekyll, Master of the Rolls, in his judgment on the case of Banks v. Sutton, I P. Will. 712, is at least shaken by the later cases, in which it has been held, that a wife shall not be endowed of a trust estate of inheritance; and it is more especially shaken by the observations which fell from Lord Hardwicke, in giving judgment on a nearly fimilar case. Godwin v. Winsmore, 2 Atk. 525.
- (c) But the husband of a feme cestuique use was not permitted to have his curtefy at common law, I Rep. 123. b. Perkins, § 463. 457. Gilb. Ufes, 25. 239. which appears also from the preamble of the statute of uses, which enumerates the inconveniences resulting from them.
- (d) Several distinctions are taken upon this point, in the judgment given by Sir J. Jekyll, in the case of Banks v. Sutton, 2 P.Will. 700. But it feems now H 2 fettled.

(5) Vernon's Cafe, 4 Rep. 1. b. Glibert's Uses, 25. 2 Bla. Com. 137. ritance, nor was it antiently of an use; and most estates being then in use, was the first occasion and original of jointures (5); though no manner of reason can be given for it, if it were res integra, but the authorities are clearly so, and it would overturn many settlements to make an alteration in it.

fettled, that a wife shall not be endowed of a trust estate of inheritance, whether the trust be created by the husband himself or by a stranger. Chaplin v. Chaplin, 3 P. Will. 229. Attorney-General v. Scott, Forrest. 138. Godwin v. Winsmore, 2 Atk. 525. Dixon v. Saville, 1 Bro. Ch. Rep. 326. Nor will the husband, having obtained a decree directing the trustees to convey to him the legal estate, differ the case. Gulston v. Gulston, per Master of the Rolls, 16th July, 1792. In Ryall v. Rowle, 1 Vez. 357, Lord Hardwicke observes, that the only case in which, as to rules of property, courts of equity do not follow the law, is, that a widow is not entitled to dower out of a trust estate.

In what cases the widow shall be endowed, notwithflanding a trust term outstanding, see § 5.

SALE ASSESSMENTS OF

SECTION II.

UPON the same kind of reasoning it is, that a trust of a term must go as the term at law would have done by the like limitations (d); and if it be given to two jointly, as survivorship would have taken place at law, it must do the same

(d) This rule feems to be laid down in too great a latitude. I have already, vol. 1. p. had occasion to observe, that, at common law, the remainder of a term, after a limitation for life, was confidered as void, and that the allowance of fuch limitation in courts of law has hitherto been confined to cases of executory devises; whereas, in equity, fuch limitations over of a term in trust, created by deed, have been allowed, Walmstrey v. Tanfield, 1 Ch. Rep. 16. Massenburgh v. Ash, 1 Vern. 234. 304. an executory devise of a term, and the limitation of the trusts of a term, being governed by the fame rules. Fearne's Ex. Dev. 354. But if such limitations over of a term in trust, created by deed, would not be allowed to operate in courts of law, it must necessarily follow. that in the construction of such limitations over in a deed, courts of equity do not confider themselves strictly bound to apply the rule which courts of law would have applied to fimilar limitations of the term itself.

(1) Afton v. Smallman, 2Vern. 556. Webb v. Webb, 2Vern. 668. D. of Norfolk v. Howard, 1 Vern. 164. (2) Draper's Case. 2 Ch. Ca. 64. Lady Shore v. Billingfby, 1 Vern. 482. See also Webster w. Webster, 2 P.Wms. 347. Cray v. Willis, 2 P.Wms. 529. Widing v. Baine 3 P.Wms. 114. Perkins v. Bayntum, Bro. Ch. Rep.

in equity (1) (e): Yet the advantage of furvivorship is against equity (f), but the Judges will have it so even in a devise to executors (2). And the distinction seems to be, where two become joint tenants, or jointly interested in a thing by way of gift, or the like, there the same shall be subject to all the consequence of law; for, in favour of volunteers, there is no reason for equity to interpose (3); but as to a joint undertaking (g) in the way of trade,

118. Frewen v. Rolfe, 2 Bro. Ch. Rep. 220. Jolisse v. East, 3 Bro. Ch. Rep. 25. Baldwyn v. Johnson, 3 Bro. Ch. Rep. 455. (3) Jefferies v. Small, 1 Vern. 217.

- (e) Unless there be an agreement between them to sever the joint tenancy. Frewen v. Rolfe, 2 Bro. Ch. Rep. 220. Parteriche v. Pawlett, 2 Atk. 55. Moyse v. Giles, 2 Vern 385.
- (f) So said arguendo in Barker v. Giles, 2 P. Wms. 281. And in Parteriche v. Pawlett, 2 Atk. 55. alienatio rei prafertur juri accrescendi, is said to be a maxim in equity. But in Cray v. Willes, 2 P. Wms. 529, the Master of the Rolls observed, that a right by survivorship is as good as a right by descent; neither is there any thing unreasonable or unequal in the law of joint-tenancy, each having an equal chance to survive. See, on this point, Staples v. Maurice, 7 Bro. P. C. 49. Campbell v. Campbell, 4 Bro. Ch. Rep. 15. Morley v. Bird, 3 Vez. 628. Stewart v. Bruce, 3 Vez. 361.
 - (g) If two take a lease jointly of a farm, the lease

trade, or the like, it is otherwise; and the custom of merchants (b) is extended to all traders to exclude survivorship (4).

(4) Lake v. Gibson, 1 Eq. Ca. Ab. 290,

shall survive, but the stock on the farm, though occupied jointly, shall not survive. Jeffries v. Small, 1 Vern. 217.

If two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies, when the money is paid, the survivor shall not have the whole, but the representative of him who is dead shall have his proportion. Petty v. Styward, I Ch. Rep. 31.

If two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, it is a joint tenancy, that is, a purchase by them jointly of the chance of survivorship. But when the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the other, in proportion to the fums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a confiderable fum of money in repairs and improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it. Per Master of the Rolls, Lake v. Gibson, 1 Eq. Ca. Ab. 291.

(h) The rule is, jus accrescendi inter mercatores, pro beneficio commercii locum non habet. Co. Litt. 182, 2.

the wall a to officer of a dia was over it for

SECTION III.

(1) D. of Norfoik's Cafe, 3 Ch. Ca. 24. YET terms are admitted to attend the inheritance to protect it for purchasers (1); and this came up in Queen Elizabeth's reign, since the way of limiting terms in mortgage came in use (i).

These

(i) The creating of terms for the purpose of securing money lent on mortgage of the land, was with a view to obviate the inconveniences which were found to arise from the ancient way of making mortgages by charter of feoffments, with a condition of defeafance; for by such mode, if the condition was not performed, the estate becoming absolute was thenceforth subject to all the real charges and incumbrances of the feoffee, and, as some thought, to the dower of his wife. See 2 Bla. Com. 158. Powell on Mortgages, 7, 8, and the authorities there referred to. See also Pawlett v. Attorney General, Hard. 466. But whether the mortgage be created by way of feoffment or by a term for years, if the mortgage debt is not paid at the time appointed, the estate mortgaged is absolutely forfeited to, and becomes the property of the mortgagee at law. But courts of equity permit the mortgagor to redeem, on payment to the mortgagee of his principal, interest, and costs; still this is merely a right in equity; the legal estate continuing in the mortgagee. the fubfequent payment, though it give the mortgagor the equitable right to the estate, not affecting the legal continuance of the term. By an analogy to the case

These trusts of terms attending on the inheritance, though entailed, were not within the statute *de donis*, and may be aliened by

of mortgages, when terms of years are created for fecuring the payment of jointures or portions for children, or for any other purpose, they do not determine, unless there be a special proviso, by the performance of the trusts for which they are raised. Thus in all these cases, the legal interest, during the continuance of the term, is in the trustee, but the owner of the fee is entitled to the equitable and beneficial interest. As courts of common law had determined, that the poffession of the lessee for years was the possession of the owner of the freehold; courts of equity determined, that where the tenant for years was but a truftee for the owner of the inheritance, he should not oust his cestuique trust, or obstruct him in any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance; it follows the defcent to the heir and all the alienations made of the inheritance, or of any particular estate or interest carved out of it, by deed, will, or act of law. Whitchurch v. Whitchurch, 2 P. Wms. 236. Gilb. Rep. 168. 9 Mod. 124. Charlton v. Low, 3 P. Wms. 330. Villiers v. Villiers, 2 Atk. 72. Willoughby v. Willoughby, Ambl. Rep. 282.; but more fully reported, I Term. Rep. 763. Goodright v. Sales, 2 Wilf. 329. Scott v. Fenhoulet, 1 Bro. Ch. Rep. 69. But, though the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law; and the whole benefit and advantage to

(2) D. of Norfolk's Cafe, 3 Ch. Ca. 16.

(3) D. of Norfolk's Case, 3 Ch. Ca. 24. by the parties (k), but of terms in gross not, and therefore the judges would not admit of their being entailed (2). And a term attendant becomes in gross, when it fails of a freehold and inheritance to support it, or is divided from the inheritance by different limitations (1), or the like (3).

be made of the term arises from this separation, by affording the means of protecting bona fide purchasers of real estates, and also of enabling courts of equity to keep real estates in the right channel; courts of equity considering such terms as creatures of equity. See Mr. Butler's Note, Co. Litt. 293, in which the utility of terms to attend the inheritance is explained and established. See also Willoughby v. Willoughby, Ambl. Rep. 282. Nourse v. Yarworth, Finch's Rep. 160.

- (k) And as it seems, without fine or recovery. D. of Norfolk's Case, 3, 10.
- (1) Every term standing out, is at law a term in gross. If it is different in equity, it must be by affecting the person holding the term with a trust to attend the inheritance. This may be by two ways, by express declaration, or by implication of law. If the term is made attendant on the inheritance by express declaration, it is immaterial whether the term, if in the same hand with the inheritance, would or would not have merged, or whether it be subject to some ulterior limitation, to which the inheritance is not subject, the express declaration will be sufficient to make it attendant on the inheritance. But if the term is to

The trusts of a term in gross therefore can be limited no otherwise in equity, than the estate of a term in gross can be devised in law (m); for they are not for setting up a rule

be made attendant on the inheritance by implication of law, then it is necessary that it should not be subject to any other limitation, and that the owner of the inheritance should be entitled to the whole interest in the trust of the term; fo that according to the rule laid down in Best v. Stamford, Pre. Ch. 253, 2 Freem. 288; if the term and inheritance had been in the fame hand, the term would have merged (as to the merger of terms, see c. 6. f. 8.); and the intent of the owner of the inheritance to purchase the whole interest in the term, will not, it feems, be fufficient to render the term attendant on the inheritance by implication of law. Scott v. Fenhaullett, 1 Bro. Ch. Rep. 69. But any limitation, though void in law, which shews an intention to fever the term from the inheritance, will be fufficient for fuch purpose. Hayter v. Rod, 1 P. Wms 359. And therefore a term, though limited in truft for A. and his heirs, will devolve on the personal reprefentative of A. Hunt v. Baker, 2 Freem. 62. See also 2 Freem. 131.

C

f

n

d

e

S

d

e

(m) A term may not only be limited to any number of persons successively for life, if all are in being at the time, but it may be limited to one for life, with remainder over to his first and other sons in tail, and for default of such issue, then to his daughters. Massenburgh v. Ash, I Vern. 234. Higgins v. Dowler, IP. Wms. 98. The result of the several decisions in support

rule of property in Chancery, other than that which is the rule of property at law (4). So that the rules are the same in equity in cases of trusts of terms, as in devises at common law (5). (n).

(4) Gilb. Uses, 189.

(5) Gilb. Ufes,

fupport of the doctrine of these cases, is thus stated by Mr. Fearne, Ex. Dev. 407. that, " whatever number of limitations there may be after the first executory devife of the whole interest, any of them which is fo limited that it must take effect, if at all, within twentyone years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations which would carry the whole interest happens to vest; but when once any preceding executory limitation which carries the whole interest happens to take place, that infant all the subsequent limitations become void, and the whole interest is then become vested." See Stanley v. Leigh, 2 P. Wms. 686. Studholm v. Hodgson, 3 P. Wms. 300. Brooks v. Taylor, Mosely, 188. Stephens v. Stephens, Forrest. 228. Gower v. Grosvenor, Barnard. 54. Doe v. Fonnereau, Dougl. 470. Marsh v. Marsh, 1 Bro. Ch. Rep. 293. Knight v. Ellis, 2 Bro. Ch. Rep. 570. Hockly v. Mawby, 3 Bro. Ch. 82. But fee Clare v. Clare, Forrest. 21. Wyth v. Blackman, 1 Vez. 196, 202.

(n) This refers to courts of law having borrowed from courts of equity the feveral principles which they now apply in the construction of the declarations of uses and executory devises. The principles which courts of law apply, in what they consider as equitable actions (trover, money had and received), are also drawn from courts of equity.

is Color a Intle time for Arch location a good lie SECTION IV.

RUT a difference between a chattel and inheritance is a difference only in words and not in reason or the nature of the thing; for the owner of a leafe has an absolute power over his lease, as the owner of an inheritance over his estate; and where no perpetuity is introduced, nor any inconvenience does appear, there no rule of law is broken (1). A (1) Per Ld. C. Nottingham, term may therefore be limited to twenty fuccessively for life, if all in being together (0), because they must all wear out in a little

3 Ch. Ca. 32.

(o) In a former note, I have referred to the origin and utility of long terms being made attendant on the inheritance. But by their operation the legal estate being separated from the beneficial interest, many inconveniences would have refulted from them, had not courts of equity interpoled and laid down certain rules restrictive of the legal right of the trustee. Hence it became a rule in equity, that where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his cestuique trust, nor pari ratione obstruct him in doing any act of ownership, or in making any affurances of his estate; and therefore in equity fuch a term for years shall yield and be moulded according to the uses, estates, or charges, which the owner of the inheritance declares or carves out of the

(2) Goring v. Bickerftaffe, 1 Ch. Ca. 8.

(3) Stephens v. Stephens, Forreft. 288.

a little time (2). And so it is a good limitation, where the contingency is circumfcribed within the compass of a life, and one step further, viz. to the first son, though not in effe, at the time and twentyone years afterwards (3). And so just and reasonable is this allowance to make provision for families, that where the common lawyers have complained that this court

Per Lord Chancellor Hardwicke, Willoughby v. Willoughby, 1 Term Rep. 765. Courts of law feeling the reasonableness of this rule, allowed it to prevail as an exception to the general rule of law, which requires a plaintiff in ejectment to recover by the strength of a legal title; fo that it is now established by many decisions, that even at law an estate in trust, merely for the benefit of the ceftuique truft, shall not be set up against him; any thing shall rather be presumed. Goodtitle v. Knott, Cowp. Rep. 46. Doe v. Pott, Dougl. Rep. 721. Lade v. Holford, Law of Nife Prius, ed. 1775, p. 110. The rule as stated in Goodtitle v. Knott, requires the trust to be merely for the benefit of the plaintiff cestuique trust, which would confine its operation to cases of satisfied terms, or terms which had done their office, fo far at least as the interest of third persons was involved. But in the case of Doe on the dem. of Bristowe v. Pegge, I Term Rep. 758, in a note, Lord Mansfield appears to have extended the application of the rule to the case of a confessedly unsatisfied outstanding term; the plaintiff admitting the charge, and claiming only subject to the incumbrances,

court did encroach upon them, it may on the contrary be retorted, that they ought rather to confess themselves beholden to this court for their rules in equity.

brances, and the trustees not afferting their title. This extension of the rule was, however, by no means satisfactory; and accordingly, in the case of Doe v. Staple, 2 Term Rep. 698. it was by the opinion of three Judges, Lord Kenyon C. J. Ashhurst J. and Grose J. (dissente Buller J.) restrained within its former limits.

SECTION V.

AND it is no strange notion at law, that long term for years should attend and wait on an inheritance; in which case they are to be governed and directed by the intention of the parties that created them (1): and when they have done their office, duty, and trust, and have born the burthen, I mean, have raised the portions which were the original cause of their creation, then ought they in equity and conscience

(1) Pre. Ch.

(2) Best v. Stamford, Pre. Ch. 252. 2 Freem. 288. 1 Salk. 154. Davidson v. Foley, 2 Bro. Ch. Rep. 213.

conscience to cease, and return back to the channel (2) from whence they were extracted (o). For it is a reason in law, that cessante causa cessat effectus; and there is no original confideration to give them a longer being: So that fuch a term ought not to be made use of to any other purpose, especially to deprive a dowress of her dower (p). But these terms have been always looked upon as a good fe-

- (o) Unless it can be collected from the instrument, that the party raising the term intended to sever it from the inheritance. Hayter v. Rod, IP. Wms. 360.
- (p) It is now fettled, though for fome time controverted, that a dowress shall have the benefit of a satisfied term against the heir. Dudley v. Dudley, Pre. Ch. 241. Higford v. Higford, 1 Eq. Ca. Ab. 219. c. 5. Duke of Hamilton v. Mohun, 1 P. Wms. 121. Williams v. Wray, I P. Wms. 137. Butler's note (1), Co. Litt. 208. The cases in which this right of the dowress was denied, were, Brown v. Gibbs, Pre. Ch. 07. Wray v. Williams, before Lord Keeper Wright, Pre. Ch. 151. A dowrefs may also, though not dowable of an equity of redemption of a mortgage in fee, Dixon v. Saville, 1 Bro. Ch. Rep. 326, redeem a mortgage for years, and hold over against an heir till fatisfied: Palmes v. Danby, Pre. Ch. 137. Powell on Mortgages, 99. but not against a purchaser, Swannock v. Lyford, Ambl. Rep. 6.

curity to a purchaser against dower, though the purchase was with notice (q).

(q) It certainly does appear, in the report of the case of Lady Radnor v. Rotherham, Pre. Ch. 65, that the purchaser had, at the time of the purchase, notice of the marriage of the vendor, and that notwithstanding fuch circumstance, Lord Chancellor Somers refused to fubject his purchase to the dower of the wife of the vendor; fuch also may be collected to have been the opinion of Lord Hardwicke, in giving judgment in the cafe of Hill v. Adams, as reported in 2 Atk. 208. fee Mr. Butler's additional note, Co. Litt. 208. b. where the judgment of Lord Hardwicke is stated from a MS. note. But if these decisions bear out the proposition, that a purchaser with notice of the wife's title to dower may defeat it, they are at least exceptions to the general principle of equity, which refuses protection even to purchasers against a present or eventual right in another of which they had notice.

SECTION VI.

BUT it is faid, that if the term be not expressly declared in the assignment to be attendant on the inheritance, but is so only by construction in equity, it shall in equity be assets for the payment of Vol. II.

I debts,

to

at

76

VI

ma

fen

cli

gor

(1) Chapman v. Bond, 1 Vern. 188, 189. debts, but the heir shall have the surplus (1); and so the difference that had been formerly taken in this case between legal and equitable assets, has been exploded (r). Yet the law seems now otherwise; for a term in the owner is assets at law, but a term in trust is not to be made assets in equity (s), and it would be dangerous to purchasers to make it so (2). Neither shall the custom of London prevent the attendance of a lease on the inheritance, though there was no declaration of trust (t), that it should be attendant (3);

(2) Tiffin v.
Tiffin, 1Vern.
1. 341.
Baden v. E. of
Pembroke,
2 Vern. 52.
3 Ch. Rep. 116.

(3) Dowfe v. Derivell,

1 Vern. 104.

- (r) The only diffinction upon this point is, whether the term be in gross or attendant on the inheritance; f the term be in gross, it is personal assets; if the term be in a trustee, and attendant on the inheritance, it is real assets; in both cases the assets are legal. What constitutes difference between legal and equitable assets will be considered, B. 4. pt. 2. c. 2. s. 1.
- (s) Such a term is, however, real affets in the hands of the heir; for the statute of frauds having made a trust in fee affets in the hands of the heir, the term which follows the inheritance, and which is subject to all charges which affect the inheritance, must be so also. See Attorney General v. Sir G. Sandys, Hard. 489. Willoughby v. Willoughby, I Term Rep. 766.
 - (t) If the implication that the term should attend the inheritance

fo if a feme covert hath such a term (4), it shall not survive to the husband (u). Indeed if a man purchases an inheritance in the name of trustees, and takes a mortgaged term carved out of such inheritance in his own name, in order to protect the inheritance, such term will be liable to the payment of his debts, because it still remains as a chattel in him (5): but if they are both in the name of other persons, there is no difference in reason, whether he had the term or inheritance first in him; but the heirs are to have the lease to attend the inheritance (6).

(4) Best v. Stamford, Pre. Ch. 254. 1 Salk. 154.

(5) Tiffin v. Tiffin, 2Ch. Ca. 49. 1Vern. 1.

(6) North v. Langton, 2 Ch. Ca. 156, 2 Ch. Rep. 142.

inheritance be raifed, all the confequences incidental to a term expressly declared attendant, will necessarily attach. See Willoughby v. Willoughby, I Term Rep. 766.

(u) In the case of Best v. Stamford, the wise survived the husband, and it does not appear that he had made any disposition, nor indeed could he, having consented to the creation of the term. I am, however, inclined to think the position within the principle which governs terms attendant on the inheritance.

CHAP. V.

Of Uses raised by Operation of Law.

SECTION I.

BUT we must examine more particularly to whom the use shall be by operation of law (a), where there is either no declaration, or but in part only, and here it is a general rule, that the trust results

(a) By the statute of frauds, as before observed, B. 2. c. 2. f. 4. all declarations of trufts of lands, Gc. are required to be in writing; but there is an express faving of trusts arising by implication of law, fee Cottingham v. Fletcher, 2 Atk. 155. and transferred or extinguished by operation of law; which trusts are declared to remain and be of the same force and effect as before the statute. Upon which, Lord Hardwicke, in the case of Lloyd v. Spillet, 2 Atk. 150, observes, that he was bound by the flatute of frauds to conflrue nothing a refulting truft, but what are there called trufts by operation of law; which are, first, when an estate is purchased in the name of one person, but the money or confideration is given by another; or fecondly, where a trust is declared only as to part, and nothing faid as to the rest, what remains undisposed of refults to the heir at law, and they cannot be faid

de

V

no

W

Ve

uf

th

fults to the party from whom the confideration or estates moved (1). As first, in case of a purchase, where a man buys land in another's name, and pays the money (2), it will be in trust for him that

1-

y

er

ıd

e-

ts

ed,

ds,

an

w.

red

are

fect

ke,

ves,

con-

nere

irst,

fon,

ner;

part,

ofed

faid

to

(1) Pelly v. Madden, 21 Vin. Ab. 498. pl. 15.

(2) Anon. 2 Ventr. 361. Gascoigne v. Theving,

pays

1 Vern. 366. Lloyd v. Spillett, 2 Atk. 150. Smith v. Baker, 1 Atk. 385.

to be trustees for the refidue. "I do not know," adds his Lordship, "any other instance besides these two, where this court has declared refulting trufts by operation of law, unless in cases of fraud, and where transactions have been carried on malâ fide." This construction of the above clause of the statute of frauds restrains it to such trusts as arise by operation of law, except in cases of fraud, whereas it clearly extends to fuch as are raifed by construction of courts of equity; as in the case of an executor or guardian renewing a leafe, though with his own money, fuch renewal shall be deemed to be in trust for the person beneficially interested in the old Holt v. Holt, I Ch. Ca. 191. Whalley v. Whalley, I Vern. 484. Sanders on Uses, 240. also observable, that the first instance stated by his Lordship of a resulting trust is not so qualified as to let in the exceptions to which the general rule, as our author properly terms it, is subject; and the fecond instance is only applicable to a will, whereas the doctrine of refulting trufts is equally applicable to conveyances. But in the case of a conveyance, it is by no means univerfally true, that what is not conveyed will refult; as where the grantor limits an estate for years to himself, and an estate to another, by way of use, upon a contingency which may not happen within the term of years, an estate of freehold will not re-

fult

(3) Palmer v. Young, 1Vern. pays the money (b). So where one of the three, that held a leafe under the dean and chapter, furrenders the old leafe, and takes a new one to himself (3), this shall be a trust for all (c). But although in the purchase-

fult to the grantor. That a voluntary conveyance does not imply a truft, fee Young v. Peachy, 2 Atk. 256.

Lord Hardwicke's view of the subject of resulting trusts seems also defective, as it is confined to cases where only part of the use is disposed of, or conveyed; whereas though the whole of the estate be conveyed, if it be for particular purposes, or on particular trusts, which by accident or otherwise cannot take effect, a trust will result; as where the testator devises real estates to trustees in trust to fell and apply the purchase money in a particular manner, and fuch purpose cannot be effectuated, the fund, though money, will be confidered as land, and will refult to the heir at law. Cruse v. Barley, 3 P. Wms. 20. Randall v. Bookey, Pre. Ch. 162. Freeman, Pre. Ch. 541. Stonehouse v. Evelyn, 3 P. Wms. 252. Digby v. Legard, Trin. 1774. Akeroid v. Smithson, 1 Bro. Ch. Rep. 503. Robinson v. Taylor, 2 Bro. Ch. Rep. 589. Spink v. Lewis, 3 Bro. Ch. Rep. 355. but such fund is personal estate of the heir and as fuch will go to his executor, Hewett v. Wright, 1 Bro. Ch. Rep. 86. Hill v. Bowyer, Rolls, 26 June, 1795. Levatt v. Redham, 2 Vern. 138.

- (b) This position is subject to the exceptions stated in the following section.
 - (c) So if a trustee purchase lands with his trust money,

purchase-deed, the consideration-money is mentioned to be paid by the purchaser, and there is no express declaration of a trust; yet it appearing upon the face of the deeds to be a trust for an infant heir in pursuance of marriage articles, and the purchaser at the courts he held declared it was his son's estate, it shall be decreed a trust for him, though to the disappointment of the purchaser's will, and of his creditors. For though creditors are favourites, yet we must not pay them out of other men's estates; nor, as Justice Twysden said, steal leather to make poor men's shoes (4).

ig re

as

or

C-

t; in

ar

he

ill

ıs.

v.

P.

oid

or,

h.

eir

ht,

ne,

ted

noey, (4) E. of Plymouth v. Hickman, 2 Vern.

ney, and take the conveyance in his own name without declaring the truft, but reciting or otherwife admitting that the purchase was made with the profits of the trust estate, a trust will clearly result for the person who was entitled to the profits. Deg v. Deg, 2 P. Wms. 414. but it was once doubted whether any thing short of the admission of the trustee, that the purchase was made with trust money, will be sufficient to raise a trust in favour of the cestuique trust. Kirk v. Webb, Pre. Ch. 84. Newton v. Preston, Pre. Ch. 103. Kendar v. Milward, 2 Vern. 440. It has however been held in more modern cases, that evidence aliunde is admiffible, to shew that the purchase was made with trust money, and that, upon fuch fact being clearly proved, a trust will result. Balguey v. Hamilton, Ryal v. Ryal, cited in Lane v. Dighton, Amb. Rep. 409.

And in Sowden v. Sowden, 1 Bro. Ch. Rep. 582. the court appears to have gone one step further, and to have prefumed that the land was purchased with the trust money, the trustee being, by the terms of his trust, under an obligation to lay the money out in the purchase of land; see also Lechmere v. Lechmere, Forrest. 80. But in a later case, Perry v. Philips, 4 Vez. 108. Lord Loughborough C. though he recognifed the authority of Sowden v. Sowden, and obferved that "the ground of that determination was that the trustee must be presumed in making the purchase to have intended to fulfil his obligation, stated that he " could find no case, no authority, or principle that intitled him where there is not a ground of prefumption; where in point of fact he must be satisfied that the party did not mean to execute the trust, or conceived himself to be under a trust to hold that the estate he purchased was subject to the trust." From this observation it may be collected, that, in his Lordship's opinion, it is not only necessary that the trustee be under an obligation to purchase land, but also that he be apprifed of fuch obligation, and that nothing appears to rebut the prefumption of his intention to difcharge it. It would ill become me to do more than to fuggest that by this construction the estate of a trustee may be benefited, either by his ignorance of his duty, or fraud in the discharge of it; and that it would perhaps be as confistent with the general spirit and policy of our equitable fystem, not to allow the plea of ignorance or fraud to be urged in support of a benefit to be derived from either; but, to conclude, that where a man is bound to do an act, and he does what may enable him to do the act, that he does it with the view of doing that which he was bound to do, or at least not to permit him in a Court of Conscience to aver the contrary.

1

S

f

t

1

e

t

1

S

t

t

1

S

SECTION II.

AND if a father purchase lands, &c. in the name of a son unadvanced, it is an advancement for him, not a trust (1); for the father is bound by the law of nature to provide for his children (d), and Chancery will compel him (e), if they

(1) Lord Gray v. Lady Gray, 1 Ch. Ca. 296. Scroop v. Scroop 1 Ch. Ca. 27,28. Mumma v. Mumma, 2 Vern. 19. Jenning v. Sellack,

1Vern. 467. Shales v. Shales, 2 Freem. 252. Gilb. Uses, 350. Bateman v. Bateman, 2 Vern. 436. Taylor v. Taylor, 1 Atk. 386. Stileman v. Ashdown, 2 Atk. 480.

- (d) The moral obligation which attaches to the parent to provide for his children, is the foundation of this rule; it must therefore be considered as confined to those cases in which the child is not otherwise provided for, fee margin (3), and must not be allowed to break in upon the legal rights of others. Therefore, though where a father purchases in the joint names of himself and a child, otherwise unprovided for, and the father dies, the child shall have the benefit of furvivorship against the heir, and all persons claiming as volunteers under, or even as purchasers with notice from the father, Scroop v. Scroop. 1 Ch. Ca. 27. Back v. Andrews, 2 Vern. 120. Dyer v. Dyer, 4 Nov. 20, 21. and 27. 1788; yet he shall not have such benefit of furvivorship against creditors. Stileman v. Ashdown, 2 Atk. 480.
- (e) Whether the Court of Chancery ever had the power here ascribed to it may be doubted, the legislature having conferred such power on the Lord Chancellor, where a popish or jewish parent resuses to allow

(2) Elliot v. Elliot, 2 Ch. Ca. 231. (3) Elliot v. Elliot, 2 Ch. Ca. 231. Lloyd v. Read, 1 P.Wms. 608. Pole v. Pole, 1 Vez. 76. (4)Lloydv.Read 1 P. Wms. 608. Attorney-General v. Bagg, Hard. 125.

are destitute, and not able to maintain themselves. But if the trust is declared before, or at the time of the purchase (2); or the father has already provided for him (3); or the whole estate is not given him (f), but part of it to another; or if he were of full age (4), and the father acts as proprietor, or does any thing which implies him to be owner of the land; this shall over-rule the presumption of law in favour of him (g). As to the grandfather.

his protestant child a suitable maintenance, 11 and 12 Wm. 3. c. 4. § 7. and I Ann. St. I. c. 30.; and with respect to parents in general, the manner in which they shall discharge this natural obligation toward their children is pointed out by 43 Eliz. c. 2. As to the jurisdiction of Chancery in such cases, see B. 2. pt. 2. c. 2. § I.

- (f) The case referred to is probably Baylis v. Newton, 2 Vern. 28.; but the report is fo confused, that it is not a direct authority for the distinction here stated.
- (g) The case of Mumma v. Mumma, 2Vern. 19, is reconciled with this distinction; the circumstance of the child's infancy, and the decision of the court, in Back v. Andrews, 2Vern. 120., and Scroop v. Scroop, 1 Ch. Ca. 27, must be referred to the purchase being in the joint names of the father and child, which gave

ther, there is a difference in the case. where the father is dead, and where he is still living; for when the father is dead, the grandchildren are in the immediate care of the grandfather (b). And therefore if he takes bonds in their names, or makes leafes to them, they shall not be adjudged as trufts, but as a provision for the grandchild, unless it be otherwise declared at the same time (5). But this is (5) Ebrand v. to be understood only of legitimate chil- 2 Ch. Ca. 26. dren; for of a bastard or reputed child, the law takes no notice (i).

43 Elis. c. 2.

gave the father an equal right to the possession, &c.

- (b) But though the grandfather be bound to provide for his grandchildren after the death of their father, courts of equity, it feems, will not affift him in the difcharge of this moral and legal obligation, and therefore will not supply the want of a surrender on behalf of a grandchild. Kettle v. Townfend, 1 Salk. 187. Tudor v. Anfon, 2 Vez. 582. - But fee Elton v. Elton, 3 Atk. 508, whence it might be inferred, that Lord Hardwicke thought a grandfather not morally bound to provide for his grandchild.
- (i) Though to any civil purposes bastards are not looked upon as children, yet, as the ties of nature cannot be dissolved, their parents are bound to maintain them; and I have not been able to find any case which renders them incapable of taking a gift from their pa-

rents, provided they be fufficiently described; such an incapacity indeed appears to have prevailed in the civil law, Cod. 6. 57. 5, but has never been adopted by the law of England. They are, from reasons of civil policy, incapable of inheriting, but not of taking by devife, if they have acquired a name by reputation. They are not confidered as children for whom the confideration of blood would raise an use; yet on an estate otherwise effectually passed, an use may be as well declared to a baftard being in effe, and fufficiently described, as to any other person. See Mr. Hargrave's note (8), Co. Litt. 123, a. Courts of equity will not indeed Supply the want of a surrender of a copyhold estate, on behalf of a baffard; Furfaker v. Robinson, Pre. Ch. 475; neither will courts of equity supply the want of a furrender in favour of a grandchild; fee B. I. c. r. § 7. note (s). Yet the natural obligation which the grandfather is under to provide for his otherwise deftitute grandchildren, has been deemed in equity a fufficient confideration to rebut the refulting trust to the grandfather; whence then the objection to a natural child's receiving equal favor? The natural obligation of a parent to maintain his illegitimate offspring is incontrovertible. See Puff. Law of Nature and Nations. b. 4. c. 11. § 6. But it may be faid, that though a baftard may take by direct gift from his parent, yet the law will not imply a gift in his favour. In those cases in which the conveyance, being taken in the name of a child, is held an advancement for, and not a trust in the child, the principle is, that the parent was bound to provide for the child, and having directed the conveyance to be in his name, is prefumed to have intended to discharge such moral duty. If such be the principle, it will follow, that wherever fuch obligation exists in the parent, the beneficial interest shall enure

enure to the child. The obligation does extend to an illegitimate child, and confequently I should conceive him to be within the principle, and entitled to the benefit.

SECTION III.

O the wife cannot be a truffee for the husband; but if the husband purchase in her name, it shall be presumed to be an advancement and provision for her (1). And the law is the same, where the purchase is to himself, his wife and daughter, and their heirs (2); or of money lent on mortgages and bonds in their names. Yet in case of creditors it may be fraudulent as to them (3), unless the purchase is made in pursuance of articles before the marriage, or as a fettlement upon the wife upon her marriage. And by the same reasoning it is, that where a wife is made executrix, it is to be prefumed that she is not so appointed to have barely an office of trouble, but

(1) Kingdome v. Bridges, 2 Vern. 67.

(2) Back v.

(3) Chrift's Hofpital v Budgin, 2Vern. 683.

(4)Ballv. Smith 2 Vern. 675.

(5) Foster v. Munt, 1Vern. 473. of benefit, to take the furplus (4), although she has a special legacy given her (i); and this is not a devise, but in nature of an exception. But otherwise of a stranger made executor, who has a particular legacy, there it implies a trust of the surplus (5). Yet the executor hath the entire right both in law and equity, unless by some such circumstances it appears that the testator intended the contrary; for it cannot be intended that a man makes a will with intent to die in-

(i) This decision is referred by Mr. Peere Williams to the reverfal of Lord Cowper's decree by the House of Lords, in the case of Lord Granville v. Duchess of Beaufort, I P.Wms. 114.: But as that reverfal proceeded on an allegation that the decree in Foster v. Munt was grounded on the fraud, and the wills being drawn at a tavern, which allegation afterwards appeared to be unfounded, the authority of Foster v. Munt is restored, and the case of Ball v. Smith has been over-ruled; and it is now fettled, that a wife appointed executrix is, as to the refidue, precifely in the fituation of any other person appointed executor or executrix. Lake v. Lake, Ambl. 126. Gobfall v. Sounden, 2 Eq. Ca. Ab. 444. pl. 58. Martin v. Rebow. 1 Bro. Ch. Rep. 154.; unless the legacy to her, being. specific, consist of property which was hers before marriage, which circumstance may vary the rule. Lawfon v. Lawson, 7 Bro. P. C. 511.; see also Hansley v. Finch, 2 Vez. 280.

testate

testate (k); and parol proof ought to be received in favour of an executor's title (l), consistent with the will (6).

(6) Petit v. Smith, 1 P.Wms. 7.

Lady Glanville v. Duchess of Beaufort, I P.Wms. 114. Gainsborough v. Gainsborough, 2Vern. 252. Littlebury v. Buckley, cited 2Vern. 677. Bachelor v. Searle, 2Vern. 736. Duke of Rutland v. Duchess of Rutland, 2 P.Wms. 210. Mallabar v. Mallabar, Forrest. 78. Lake v. Lake, 1Wils, 313. Ambl. 126. Brown v. Selwyn, Forrest. 240.

- (k) By law, the appointment of an executor vests in him all the personal estate of his testator, and if any surplus remain after payment of suneral expences and debts, such surplus will belong to the executor. But in equity, if it can be collected from any circumstance or expression in the will, that the testator intended his executor only the office, and not the beneficial interest, such intention shall receive essect, and the executor shall be deemed a trustee for those on whom the law would have cast the surplus in case of a complete intestacy. The cases upon the subject are numerous, and not easily reconcilable. I will however endeavour to extract the several rules which have governed their decision.
- 1. As the exclusion of the executor from the residue is to be referred to the presumed intention of the testator that he should not take it beneficially, an express declaration that he should take as trustee will of course exclude him. Pring v. Pring, 2 Vern. 99. Graydon v. Hicks, 2 Atk. 18. Wheeler v. Sheers, Mosely, 288. 301. Dean v. Dalton, 2 Bro. Ch. Rep. 634. Bennett v. Bachelor, 3 Bro. Ch. 28. I Vez. Jun. 63.; and the exclusion of one executor as a trustee will consequently exclude his co-executor, White v. Evans, 4Vez. 21.; and see Dalton v. Dean, to shew that direction to reimburse

imburse the executors their expences, is sufficient to exclude them, 2 Bro. Rep. 634.

- 2. Where the testator appears to have intended by his will to make an express disposition of the residue, but, by some accident or omission, such disposition is not persected at the time of his death, as where the will contains a residuary clause, but the name of the residuary legatee is not inserted, the executor shall be excluded from the residue. Bp. of Cloyne v. Young, 2Vez. 91. Lord North v. Purdon, 2Vez. 495. Hornsby v. Finch, 2Vez. Jun. 78.
- 3. Where the testator has by his will disposed of the residue of his property, but by the death of the residuary legatee, in the life-time of the testator, it is undisposed of at the time of the testator's death. Nichols v. Crisp, Ambl. 769. Bennett v. Bachelor, 3 Bro. Ch. Rep. 28.
- 4. The next class of cases in which an executor shall be excluded from the residue, is, where the testator has given him a legacy expressly for his care and trouble: which, as observed by Lord Hardwicke in Bp. of Cloyne v. Young, 2 Vez. 97, is a very strong case for a resulting trust, not on the foot of giving all and some, but that it was evidence that the testator meant him as a trustee for some other for whom the care and trouble should be, as it could not be for himself. Foster v. Munt, 1 Vern. 473. Rachfield v. Careless, 2 P. Wms. 157. Cordel v. Noden, 2 Vern. 148. Newstead v. Johnstone, 2 Atk. 46.
- 5. Though the objection to the executor's taking part and all has been thought a very weak and infufficient ground for excluding him from the refidue, as the testator

testator might intend the particular legacy to him in case of the personal estate falling short, yet it has been allowed to prevail, and it is now a fettled rule in equity, that if a fole executor has a legacy generally and abfolutely given to him, (for if under certain limitations, which will be hereafter confidered, it will not exclude,) he shall be excluded from the residue; Cook v. Walker, cited 2Vern. 676. Joslin v. Brewett, Bunb. 112. Davers v. Dewes, 3 P.Wms. 40. Farringdon v. Knightly, I P.Wms. 544. Vachell v. Jefferies, Pre. Ch. 170. Petit v. Smith, I P. Wms. 7; nor will the circumflance of the legacy being specific, be sufficient to entitle him; Randall v. Bookey, 2 Vern. 425. Southcot v. Watson, 3 Atk. 226. Martin v. Rebow, 1 Bro. Ch. Rep. 154; nor will the testator's having bequeathed legacies to his next of kin vary the rule; Bayley v. Powell, 2Vern. 361. Wheeler v. Sheers, Mosely, 288. Andrew v. Clark, 2 Vez. 162. Kennedy v. Stainfby, E. 1755, stated in a note, IVez. Jun. 66: for the rule is founded rather on a presumption of intent to exclude the executor, than to create a trust for his next of kin. and therefore if there be no next of kin a trust shall refult for the crown. Middleton v. Spicer, I Bro. Ch. Rep. 201.

With respect to co-executors, they are clearly within the three first stated grounds on which a sole executor shall be excluded from the residue. But as to the sourth ground of exclusion, quare, Whether a legacy given to one executor expressly for his care and trouble, will, if no legacy be given to his co-executor, exclude? As to the fifth ground of exclusion of a sole executor, several points of distinction are material in its application to co-executors. A sole executor is excluded from the residue by the bequest of a legacy, because it shall not be supposed that he was intended to Vol. II.

take part and all. But if there be two or more executors, a legacy to one is not within fuch objection, for the testator might intend a preference to him pro tanto. Colefworth v. Brangwin, Pre. Ch. 323. Johnson v. Twist, cited 2 Vez. 166. Buffar v. Bradford, 2 Atk. 220. So where feveral executors have unequal legacies, whether pecuniary or specific, they shall not be thereby excluded from the refidue. Brasbridge v. Woodroffe, 2 Atk. 68. Bowker v. Hunter, 1 Bro. Ch. Rep. 328. Blinkhorn v. Feaft, 2Vez. 27. But where equal pecuniary legacies are given to two or more executors, a trust shall result for those on whom, in case of an intestacy, the law would have cast it. Petit v. Smith, 1 P. Wms. 7. Carey v. Goodinge, 3 Bro. Ch. Rep. 110. But see Heron v. Newton, 9 Mod. 11. Qu. Whether distinct specific legacies of equal value to several executors, will exclude them?

It now remains to confider in what cases an executor shall not be excluded from the residue; upon which it may be flated as an universal rule, that a court of equity will not interfere to the prejudice of the executor's legal right, if fuch legal right can be reconciled with the intention of the testator, expressed by or to be collected from his will; and therefore even the bequest of a legacy to the executor shall not exclude, if fuch legacy be confistent with the intent, that the executor shall take the residue; as where a gift to the executor is an exception out of another legacy. Griffith v. Rogers, Pre. Ch. 231. Newsfead v. Johnstone, 2 Atk. 45. Southcot v. Watfon, 3 Atk. 229. Or where the executorship is limited to a particular period, or determinable on a contingency, and the thing bequeathed to the executor upon fuch contingency taking place, is bequeathed over. Hoskins v. Hoskins, Pre. Ch. 263. Or where the gift is only a limited interest, as for the

9.

1

).

1

1

h

f

1-

d

0

if

ζ-

(-

h

re

1-

e,

10

fe

life of the executor. Lady Granville v. Duches of Beaufort, 1 P. Wms. 114. Jones v. Westcombe, Pre. Ch. 316. Nourse v. Finch, 1Vez. Jun. 356.

(1) That parol evidence is admissible for the purpose of rebutting a refulting truft, is incontrovertibly established by the several cases referred to in the margin; but it is faid, in feveral cases, that it ought to be admitted with great caution; Duke of Rutland v. Duchess of Rutland, 2 P.Wms. 215. Rachfield v. Careless, 2 P.Wms. 160. Blinkhorn v. Feaft, 2Vez. 28. Nourse v. Finch, 1 Vez. Jun. 358; and restricted to what passed at the time of making the will. Duke of Rutland v. Duchess of Rutland, 2 P.Wms. 315. Nourse v. Finch, IVez. Jun. 359. Such restriction would indeed, under some circumstances, be extremely proper; as if the testator, at the time of making his will, declared, that his executor should or should not have the refidue, fuch declaration ought not to be controverted by contrary declarations, made prior or fubfequent to the making of the will. But supposing no converfation to have been had respecting the residue at the time of making the will, but subsequent thereto the testator had declared that he had and intended, by appointing A. his executor, to give him the refidue; should evidence of such the testator's construction of his appointment of A. to be his executor be rejected? the testator's construction in such case would be strictly correct, with reference to the rule of law, which is, that the executor shall take every thing not disposed of; and with the reasoning of courts of equity, which qualifies the legal right, the testator might be, and such declaration would shew he actually was, wholly unacquainted. To reject evidence explanatory of the teftator's intention would, under fuch circumstances, wholly defeat it, and that, in order to enforce a rule K 2 of

of equity, which professes to effectuate the testator's intention.

With respect to evidence of declarations prior to the making of the will, unless in the shape of instructions for such purpose, they are obviously intitled to less respect than declarations made at the time of, or subsequent to, the making of the will; for whatever might be the intention at the time of the declaration, it might have been varied, or been wholly abandoned, at the time of making the will. The greatest circumspection is, therefore, due, in receiving evidence of declarations prior to the making of the will, unless, as before observed, they were intended as directions or instructions for such purpose. See Clannell v. Lewthwaite, 2Vez. Jun. 473. and the cases there considered.

SECTION IV.

THE second fort of resulting uses are upon conveyances. For every man that hath lands, hath thereby two things in him; the one the possession of the land, which, in the law of England, is called the freehold; and the other, the authority to take the profits of the land, which is the use

tl

use (1). And, therefore, where there is a (1) Co. Lit. feoffment to particular uses, the residue of the use shall be to the feoffor (m); for the raising those particular estates appears a fufficient confideration for making the conveyance. And there is no great differ-

S

C

e

0

e

le

23 a. 271. b. Sanders on Ufes, 127-

(m) I have already had occasion to refer to the doctrine of refulting uses, where no confideration or declaration of the use appears on the conveyance, and the principle upon which an use will result in those cases, namely, that fo much of the use as a man does not dispose of remains in him, extending to cases where a man makes a feoffment, or other conveyance, and parts with, or limits only, a particular estate, and leaves the refidue undisposed of, it follows, that where there is a feoffment to particular uses, the residue of the use shall be to the feoffor, and that although the feoffment be made for a confideration; for it is the intent that guides the use; and here the feoffor expressly declaring a particular estate of the use, it shews, that if he intended to depart with the refidue, he would have declared that intention also; but, in this particular, a distinction is observable, where there is a consideration, though purely nominal, and no use is declared, and where some part of the use is declared; for, in the first case, no use will result to the feoffor, the payment of even a nominal confideration shewing an intent that the feoffees should have the use; whereas, in the latter case, the consideration will be referred to the particular uses declared, and the refidue of the use will refult. Shortridge v. Lamplugh, 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. Lloyd v. Spillett, 2 Atk. 148. Barnard, 384.

ence

ence (n) between a feoffment to uses, and a covenant to stand seized; for so much as he does not dispose of remains in him as the ancient use in both cases, although, in the one, there is a transmutation of the possession,

(n) One difference between a feoffment to uses, and a covenant to stand seized, is, that in a covenant to fland feized to uses, not only so much as the covenantor does not dispose of remains in him, but also fuch uses as do not or cannot take effect; as if A. covenant, in confideration of blood, to stand feized to the use of B. his son, for life, and in consideration of 1000l, to stand seized to the use of C. in sec, after the death of B., and B. refuse the use, A. shall retain, and C. shall not take immediately; whereas, if A. had made a feoffment to the use of B. for life, and after to the use of C. for life, and B. refused, in that case C. should take his estate presently. The reason of which distinction is, that, in the latter case, the feoffor, by his feoffment, hath put the whole estate out of him, and all the uses are created out of it, as out of one and the same root; and, therefore, so long as any of the uses can take effect, the feoffor shall not meddle with the land; but, in the former case of a covenant raising an use, there the consideration, which is the cause which raises every several use, is several, and all the uses grow and arise out of the estate of the covenantor; and, therefore, if one refuses, he who is next in remainder shall not take presently, but the covenantor shall keep it. Rector of Chedington's Cafe, I Rep. 154. b. Lord Paget's Cafe, I Leon. 200. As to the difference between a covenant to stand feized

possession, and in the other not (2). So that there feems no refulting use or occafion for a priority of an instant, (viz. that it should first vest, and then return (3). But there is a difference, where he who has the use limits it to A. for life, remainder to the heirs of the body of B.; here no estate can arise to B., because nothing moved from him: otherwife, if the limitation is to the heirs of his own body (4), there ut res magis valeat, he shall have it for his life (o). And although an estate cannot arise by implication in a deed, even by way of use, and a man cannot convey to himself (5), yet a man may qualify an estate that is in him (6). But if a man covenant to fland feized to fuch uses, as that he should leave a descendible estate in himself, as to the use of his son from and after his marriage, or to the use of 7. S. after forty years; these are not to be refembled

ŧ

0

d

-

1

f

d

lt

n

e

e

S

5

t

h,

e

S

e

S

(2) Pybus v. Mitford, 1 Vent. 372.

(g) Pybus v. Mitford, 1 Ventr. 375, 376.

(4) Pybus v. Mitford, per Lord Hale, 1Venir. 378. 1 Mod. 98. Davis v. Speed, 4 Mod. 153.

(5) Pybus v.
Mit ord,
1 Ventr. 379.
(6) Lane v.
Pannell,
1 Roll's Rep,
239.
Southoot v.
Stowel,
2 Mod. 207.

feized to use, and a conveyance at common law, see Southcot v. Stowel, 2 Mod. 207.

(0) See Southcot v. Stowel, 2 Mod. 211, where this point is doubted, and Fearne's Ess. Cont. Rem. 30. 33, where it is supported, and the difference between the cases stated to be, that, in Pybus v. Mitsord, the covenantor

refembled to the cases where the precedent estate cannot continue longer than his life (p), and this without any wrong done to any rule of law, may be turned to an use for life, and therefore such construction shall be (7).

(7) Per Lord Hale, 1Ventr.

covenantor had not limited any use during his whole life; whereas, in Southcot v. Stowel, he had limited a present use to his son in tail.

(p) For the father dying before the marriage of his fon, in the one case, or before the expiration of the forty years, in the other case, the estate would descend. Pybus v. Mitsord, 1 Mod. 160.

SECTION V.

AND the words of the statute 29 Car. 2. cap. 3, and to no other uses, shall be construed to no other express uses; but shall not prevent uses by implication, which arise of necessity, because the uses must be in some body. But an use reserved by implication of law, shall not be implied against the express intent of the conveyance; for the statute of frauds, which

which faves refulting trusts, extends only to such as were resulting trusts before the statute, and a bare declaration by parol before the act, would prevent any resulting trust (1); so if an express estate be limited to the covenantor (q). A fortiori, where the estates take essect by transmutation of possession, and a particular estate is limited to the grantor, as for ninety-nine years (2), remainder to trustees for twenty-sive years, remainder to himself in tail male, &c. this is void, for want of a free-hold to support it.

(1) Bellafis v. Compton, 2Vern. 294. Gilb. Uses, 59.

(2) Adams v. Savage, 2 Salk. 679. See also Dyer, marg. 111 Rawley v. Holland, 22 Vin. Ab. 189. c. 11.

2 Eq. Ca. Ab. 753. Fearne's Effay Cont. Rem. 16. et feq.

(q) The grantor, in this case, having expressly limited an estate for years to himself, had he taken the freehold by implication, this use for years would have been merged in it, which would be raising an estate by implication, to destroy an estate expressly limited in the deed, directly contrary to the nature of implications. Fearne's Cont. Rem. 41. But if an estate for years had been limited away, and no use limited to the grantor, he would have been by implication entitled to the use of the present freehold, which was not limited away, which would have supported the limitation over to the heirs of his body. Penhay v. Hurrell, 2 Vern. 370. 2 Freem. 231. 235.258.

C H A P. VI.

Of the Extinguishment of Uses.

SECTION I.

E will now see where the use may be extinguished, or not. For to every execution of an use by force of this statute, four things are requisite (1): 1st, A perfon seized (a); 2dly, A person cestuique use

(1) Chudleigh's case, 1Rep. 126.

- (a) Though I have already had occasion to touch upon this point, it may be material to consider more particularly who may be and shall be considered to be seized to an use; in the course of which, I shall point out what persons, though incapable of being seized to an use, may hold as trustees. To stand seized to an use, two things are necessary; first, That the person be capable of considence and trust; secondly, That he take the estate under the trust limited and appointed.
- tit, All persons (in which are included even semes covertes and infants) may prima facie be considered as capable of considence; it will therefore be sufficient to enumerate the exceptions to this general capacity.
- 1. Bodies politic are not capable, because they are framed at the will of the king, and are no further capable than he wills them; and it is his will that they should

use (b); 3dly, An use in esse (c), viz. in possession, reversion, or remainder; 4thly,

The

should purchase for the common benefit, and for the ends of their creation, and that they should not take any thing in trust for others; also, being incorporate, the Chancery had no process on the persons to compel them to discharge their trust, Gilb. 5. 1 Rep. 122. Poph. 72.: But chiefly, fays Lord Bacon, because of the letter of the statute, which, in any clause when it fpeaketh of the feoffee, resteth only upon the word perfon; but when it speaketh of cestuique use, it addeth person or body politic. Readings on statute of uses. 347. And as bodies corporate are incapable of flanding feized to an use, so are they incapable of taking as trustees, Sonley v. Masters, &c. of the clock-makers company, I Bro. Ch. Rep. 81, except as trustees for charities, which they are allowed to do by the equity of 43 Eliz. c. 4. § 1. Griffith Flood's Cafe, Hob. 136. 2 Vern. 454. Sanders' Uses, 153.

- 2. Aliens and persons attainted are not capable of standing seized to an use, for they can take for no person's benefit but the king's. I Rep. 122. Poph. 72. I Roll's Rep. 382.
- 3. The king cannot be feized to an use, because there is no means to compel him to perform his trust, Poph. 72. Hard. 468. I Roll's Rep. 332. Bro. Feoffm. al. Uses, 338. Gilb. Uses, 5. But in the case of Killdare v. Eustage, I Vern. 439, the master of the rolls intimated an opinion that the king might be a trustee. But quære?

The estate out of which the use arises ought to vest in cestuique use (d). And all these four

2dly, But though the person be capable of confidence and truft, yet it is further requisite, in order to affect him with the use; that he take the estate upon the trust limited, which may be done by express words, or by implication.

- 1. By express words, as where by the words of the deed the uses are distinctly and expressly declared.
- 2. By implication, as where one takes a feoffment without confideration, or having notice of the feveral uses and trusts, there he shall be supposed to take it fubject to those uses and trusts, for the law will suppose a man's actions rather just than otherwise. But where a man takes from the feoffees, for valuable confideration, a greater estate than they had, he shall not be affected by the use though he had notice of it, but shall take it to his own use, Gilb. Uses, 6, 7; neither shall a man be affected with a use to another if his claim be founded on a title paramount, as the title of a lord by escheat, or the lord of a villein, or a lord who enters for mortmain, or who recovers by a ceffavit, Gilb. Ufes, 10. 1 Rep. 122; nor shall persons be affected with an use to another, who claim adverfely to the estate out of which the use was to be served, as diffeilors, abators, intruders; Gilb. Ufes, 10. 1 Rep. 122; nor shall perfons whose estates are cast upon them by act of law stand seised to the use of another, as tenants by the courtefy, tenants by dower, and tenants in tail, Gilb. Uses, 10, 11. 171. Sanders' Uses, 86. 1 Rep. 122; but a tenant in tail may be a truftee, Clowdfly v. Pelham,

four must concur at one and the same point of time. So that every use in esse, viz. in possession,

ham, IVern. 411. whether he may not fland feised to an use; see Sanders on Uses, 145; Mr. Hargrave's note (3), Co. Litt. 19. b.; Lord Bacon's Readings on Statute of Uses, Law Tracts. 347: In thort, there must to every seisin to an use be a considence in the perfon, and privity of estate, and if either of these requifites be wanting, or fail, the use cannot be executed. But though the use cannot be executed for want of a person capable of standing seised, yet as a trust shall never be allowed to fail on account of any disability in the truftee, courts of equity being guided more by the intent in raifing and fastening the trust on the estate than by the ability or difability of the truftee; therefore though no truftee be named, or he die in the lifetime of the testator, or he be an improper or incapable person, yet the trust shall prevail, and the author of the trust or his heir shall be decreed to execute it. Gravenor v. Hallum, Ambl. 642. Sonley v. Mafter, &c. of the clockmakers company, I Bro. Ch. Rep. 81. Quare, Whether such defective use would not before the statute have been supported in equity? See I Rep. 137.

(b) As there should be a person capable of being seised to an use, so must the person in whose favour it is to arise, be capable of receiving or taking it. Persons therefore who are incapable of taking the lands themselves, are incapable of taking an estate in the lands by way of use. But if they are capable of taking though not of holding the lands, as in the case of an alien, Co. Litt. 2. b. Mr. Har. note (1), Godb. 275.

possession, reversion, or remainder, where the other circumstances are not wanting, is executed by the statute immediately (e);

Dyer 283, b. (but fee Gilb. Uses, 43, 204), they are capable of an use in the lands: the king, though he cannot have feoffees to his use, may take an use by conveyance of record, Lord Bacon's Readings, 349. Gilb. Uses, 44. Sanders' Uses, 90; but a monk cannot have an use, Gilb. Uses, 90. nor will an use arise to a parish; but though a limitation of an use to a parish is void as an use, yet it is good as a trust, Gilb. Uses, 44. Sanders' Uses, 90, 91.

- (c) The words of the act being "every person that has, or hereafter shall have any use," to the raising of which, as already observed, there must be a subject on which an use may be limited, viz. of which the use can be separated from the possession, and whereof seisin can be inflantly given, and also a sufficient consideration or an express declaration of the use.
- (d) The act declaring, "That the estate of such person seised to an use shall be adjudged in cestuique ufe."
- (e) As the statute mentions uses, trusts, and confidence, it executes the possession to the use if expressed by either of these words; Eure v. Howard, Pre. Ch. 345. Skin. 209; Broughton v. Langley, 2 Salk. 679; fee Sanders on Uses, 154. As to what other words will raise an use, see Sanders, 155. 161.

But it feems material to remark, that as it is a rule that where conveyances may operate both by common law

but no future or contingent use, till they come in esse. 2dly, All uses, whether contingent or others, not executed by the statute, remain in the mean time at common law; so that if the root is deseated, out of which they ought to spring, the uses are utterly destroyed (2); that is, if the seosses and their heirs do not continue their seisin, or some other by their assignment, against whom there may be a remedy in equity; as where the party is in, in the per, and with notice (3), or without a consideration, for then the law implies notice (f): But a

(2) Chudleigh's cafe, 1Rep.121, 122, 126. Haynes v. Villars, 2 Siderf. 64. 158.

(3) Wegg v. Vitlers, 2 Roll's Ab. 796, 797.

law and flatute, they shall receive their operation from the common law, if a feoffment be to A. and his heirs, to the use of A. and his heirs, such use will not be a statute use, but a common law use, the use and the estate going together. See Jenkins v. Young, Cro. Car. 230. Lord Altham v. Earl of Anglesey, Gilb. Rep. 16.

(f) "Originally it was held that chancery could give no relief but against the very person himself intrusted, for cestuique use, and not against his heir or alience. This was altered in the reign of H.6. with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such aliences as had purchased either without a valuable consideration, or with an express notice of the use, 2 Bla. Com. 329;" and the reason assigned by Lord Bacon is, "because the chancery looketh farther than the common law,

(4) Bolls v. Sir H. Winton, Noy, 122. 2 Roll's Ab.

794. Gilb. Ufes

139.

leafe for years shall only bind the future use, and not destroy it for the freehold, because the seisin remains (4). 3dly, It was formerly held, that the feoffees after the statute had a possibility to serve a future use, when it came in esse, and that they should be reputed the donors of all the contingent estates when they vested; and if the possession was disturbed, the feoffees should have power to re-enter to revive the future uses according to their trust; but if they bar themselves of their entry, then this case being not remedied by the statute, remains at common law (5). But this opinion has been fince contradicted (g); and

(5) Chudleigh's cafe, 1 Rep. 137. Shepherd's Touchf. 523.

viz. to the corrupt conscience of him that will deal in the land, knowing it in equity to be another's; and therefore if there were radix amaritudinis, the consideration purgeth it not, but that it is at the peril of him that giveth it; so that consideration or no consideration is an issue at the common law, but notice or no notice is an issue in the chancery. Readings on Stat. of Uses, 312.

(g) See Hales v. Risley, Pollex. 390; in which the doctrine laid down in Chudleigh's case, and Wegg v. Villers, and several other cases, is referred to the dread of a perpetuity; and as such reason is done away by the determination of Archer's case, the power of the seosses to destroy the contingent remainders, or the necessity

and it is now held, that, to the raising of the future uses after the statute, the regress of the seosses is not requisite, and that they have no power to bar these suture uses; for the statute has taken and transferred all the estate out of them, and they are as mere instruments. So that contingent uses do now, like other contingent remainders, depend upon the particular estate. For to reduce the estates

necessity of their entries to reduce or restore them, are faid no longer to exist. With respect to the necessity of the feoffee's actually entering to restore the contingent uses, Mr. Fearne observes, that we ought to be very cautious how we at this day admit fuch a doctrine in practice, a doctrine which would lead us to conclude, that in the common cases of strict settlement upon marriage, where the conveyance is by way of ufe, if the father, the first tenant for life, were by feoffment to devest the estates, leaving them a right of entry, the contingent remainders to the fons could not take effect, unless the mother, supposing her to take a remainder for life, and to furvive the father, or elfe the truftees, to whom the remainder for preferving contingent uses was limited, or else the general grantees or releasees to whom the lands were conveyed to the uses expressed, should actually make an entry into the lands; an opinion which he observes, with all due deference to what was delivered by the Court of King's Bench, in their arguments upon the case of Wegg v. Villers, he cannot perfuade himself would hold at this day.

Vol. II.

L

con-

conveyed by way of use to the common law, which all sides agree was the chief end of the statute of uses, nothing ought to be lest in the seosses, no need of any scintilla juris, or power of re-entry for the benefit of the contingent uses, nor power in the seosses to destroy them, but they are mere conduit-pipes. And the other conceit was grounded, as it seems, upon a zeal against perpetuities and contingent remainders (6), there being at that time no received opinion that the destruction of a particular estate would destroy a contingent remainder, till afterwards, in Archer's case (7), it was so adjudged.

(6) Ha'es v. Rifley, Poliexf. 385. 392.

(7) 1 Rep. 66.

SECTION II.

AND it feems to be the rule of this court, that where a man is a purchaser for valuable consideration, without notice, he shall not be annoyed in equity

equity (h); not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other (1). But by taking a conveyance, with notice of the trust, he himself 2 Vern. 599. becomes the trustee (i); and must not, to

(1) Wilker v. B dington, Gols and Ward, Forreft. 69. Manfell v. Manfell,

get

2 P.Wms. 678. Brandlym v. Ord, i Atk. 571. Snelling v. Squint, 2 Ch. Ca. 47. Millard's Case, 2 Freem. 43. Digby v. Morgan, 1 Ch. Rep. 129.

- (b) This rule is founded on a principle of equity too obvious to require illustration. It feems, however, to have been broken in upon by the decisions in the cases of Burgh v. Burgh, Rep. Temp. Finch 28, and Williams v. Lambe, 3 Bro. Ch. 264. In the former of which cases, the court appears to have interposed to the prejudice of a judgment-creditor, without notice of plaintiff's equity; and, in the latter, to the prejudice of a purchaser, without notice of plaintiff's title as dowress. With respect to those instances in which a bona fide purchaser has in equity been postponed, in respect of his conniving at the subsequent fraud of him under whom he derived his title, they are evidently exceptions to the general rule, which is confined to the claim of the purchaser at the time of completing his purchase; a claim which he may forfeit as to third persons, by subsequent misconduct. See B. I. c. 3. f. 4.
- (i) This proposition is stated too generally; for though an immediate or first purchaser, with notice of an equitable claim in another, shall certainly not be allowed, though a purchaser for valuable consideration, to protect himself against such equitable claim; yet if a person

(2) Saunders v Dehew, 2 Vern. 271.

(3) Culpepper v. Afton, 2 Ch. Ca. 115- 221. Elliott v. Merryman, Barnard, 78. Lloyd v. Baldwin, 1 Vez. 173. Ithell v. Beane, get a plank to fave himself, be guilty of a breach of trust, notwithstanding any consideration paid (2). Yet where the trust is general, as to pay debts, though he has notice of them, the purchaser seems not obliged to see the money applied (3); otherwise, if the debts be particular (k), as for payment of debts in a schedule (4).

Ithell v. Beane, 1 Vez. 215. Smith v. Guyon, 1 Bro. Ch. Rep. 186. Hampson, 2 Vern. 5. Lloyd v. Baldwyn, 1 Vez. 173.

(4) Cottrell v.

a person, having notice of an equitable claim in another, purchase from one who had not notice of such claim, he may protect himself by want of notice in his vendor, fuch protection being necessary to secure to the bona fide purchaser, without notice, the full benefit of his purchase. Harrison v. Forth, Pre. Ch. 51. Brandling Sweete v. Southcote, 2 Bro. v. Ord, 1 Atk. 571. Rep. 66. Neither shall a purchaser, without notice from a purchaser with notice, be considered in equity as bound by the truft. Ferrars v. Cherry, 2 Vern. Mertins v. Jolliffe, Ambl. 313. It may be material to remark, that notice is not confined to the time of the contract; for if a person who has a lien in equity on the premises, give notice of such equitable lien before actual payment of the purchase money, it is sufficient; Tourville v. Nash, 3 P. Wms. 307. Story v. Lord Windsor, 2 Atk. 630. Hardingham v. Nicholls, 3 Atk. 304. Or before the execution of the conveyance, though the purchase money be actually paid. See Wigg v. Wigg, 1 Atk. 384.

So although the law hath intrusted the executor with the personal estate to pay debts, and unless he has an absolute power, he has none at all; yet if a term is devised to executors to raise 2000/. for the portion of his daughter, and the executors mortgage this term, the portion shall be preferred (1).

- (k) But though the purchaser be bound to see to the application of the money, as to schedule debts, he is not bound to see that only so much real estate is sold or mortgaged as will discharge such scheduled debts, Spalding v. Shalmer, I Vern. 301, unless there be collusion between the heir and trustee, Culpepper v. Aston, 2 Ch. Ca. 115, 221. Neither is he bound to see to the payment of debts generally nor of legacies, if the estate be charged generally with debts and legacies; for not being, in such case, bound to see to the discharge of debts, he cannot be expected to see to the discharge of legacies, which cannot be paid till after the debts. Marvin v. Cook, 5 May 1708. Jebb v. Abbot, 9th February 1782. Bro. Appendix to I vol. Rep. Ch. p. 11. Rogers v. Skillicorne, Ambl. 188.
- (1) This point was so adjudged by the House of Lords, in the case of Humble v. Bill, 2 Vern. 444. But it seems to have been overruled by the case of Ewer v. Corbett, 2 P. Wms. 148. Elliott v. Merryman, 2 Atk. 41. and particularly in Nugent v. Gisford, 1 Atk. 463. recognised in Ithell v. Beene, 1 Vez. 215. Mead v. Lord Orrery, 3 Atk. 235. In which cases it was held, that the alienation of the executor,

even for his own debt, would be good, unless the purchaser colluded with the executor, as in Crane v. Drake, 2 Vern. 616. But see Tomlinson v. Smith, Rep. Temp. Finch 378. Langley v. E. of Oxford, Ambl. 17, and Mr. Butler's note, Co. Litt. 292. See also Andrew v. Wrigly, 4 Bro. Rep. 125.

SECTION III.

TT is notice of the use, therefore, that is all the effect of the matter: for then he is particeps criminis, et dolus et fraus nemini patrocinantur (1), fince in conscience he purchased my land or my goods. For the common law, whenever it found a confideration, discharged the covin; but Chancery looks further to the corrupt conscience of the party, that will traffic for what in equity he knows to belong to another (2). And in all cases where the purchaser cannot make out a title, but by a deed which leads him to another fact. the purchaser shall not be a purchaser without notice of that fact, but shall be prefumed

(1) Fermor's Case, 3 Rep. 78. b. Palmer, 158.

(2) Ld. Bacon's Readings, P. 312.

prefumed cognizant thereof (m); for it was crassa negligentia, that he fought not after it, and this is in law a notice (3). So where in a jointure there was a covenant against incumbrances, except leases, or copies determinable on three lives, the exception of leafes ut fupra, gave notice of former leafes, and therefore he must take notice of the covenants contained in them (4). So there was fufficient notice in law, or an implied notice, where the mortgage was excepted in the defendant's conveyance, and therefore they could not be ignorant of the mortgage, and ought to have feen it, and that would have led them to the other deeds, in which, purfued from one to the other, the whole case must have been discovered to them (5). And notice of the marriage (5' Bifco v. E. has been construed as notice of the jointure; because the wife, being under the power of her hufband, could not give proper notice, fo as to prevent the aliena-

(3) Moor v. Bennett, 2 Ch. Ca. 246. Bovey v. Smith, 1 Vern. 149. Ferrars v. Cherry, 2 Vern. 384. Dunch v. Kent, 1 Vern. 319. Draper's Company v. Yardley, 2 Vern. 662.

(4) Tanner v. Florence, 1 Ch. Ca. 250. Vane v. I.d. Barnard. Gilb. Rep. 7.

of Ban ury, 1 Ch. Ca. 287.

⁽m) The general rule is, that whatever is sufficient to put the party upon an inquiry, is good notice in equity. Smith v. Low, 1 Atk. 490. Mertins v. Jolliffe, Ambl. 313. See also Plumb v. Fluitt, MS. Ex. 3 Feb. 1791. Tayler v. Stibbert, 2 Vez. Jun. 437.

tion of her interest. So if a man purchases under a will, by which the trust is created, he must, at his peril, take notice of the operation and construction of the law upon it. And though this be called a notional notice, yet it is fuch a notice as has always been allowed to be good; for every man is prefumed to be conusant of the law of the realm (n), and he shall not take advantage of his own ignorance, but caveat emptor(6).

(6) Arg. Bovey v. Smith, 1 Vern. 149.

(n) So also is every man presumed to be attentive to what passes in a sovereign court of justice; and, therefore, a purchaser pendente lite, even for valuable confideration, and without express or otherwise implied notice, will be bound by the decree. Sorrell v. Carpenter, 2 P. Wms. 482. Whitsley v. E. of Scarborough, 3 Atk. 392. Moor v. Moor, Bard. 407. Smalwood, Ambl. 676. But lis pendens being only a general notice of an equity to all the world, it cannot affect any particular person with a fraud, unless such person had also express notice of the title in dispute. Meedv. Lord Orrery, 3 Atk. 243. The lis pendens must also, in order to bind, be in full profecution. Preston v. Tubbin. I Vern. 286. In general, a decree is not constructive notice to persons not parties to it; but if a person not party have express notice of such decree, he shall be bound by it. Harvey v. Montague, I Vern. 57.

SECTION IV.

AND notice of the plaintiff's title to the agent or purchaser for another (1), as likewise notice to the counsel or attorney that peruses the title (2), is notice to the party himself, because a prefumptive notice to the party. So where all the fecurities were transacted by the fame scrivener (3), notice to him is notice to them all; and confequently they that lend last must come last, for he was in nature of an agent to them all. So where A., having notice of an incumbrance. purchases in the name of B., and then agrees that B. shall be the purchaser, and he does accordingly pay the purchase money, without notice of the incumbrance; though B. did not employ A., nor knew any thing of the purchase till after it was made, yet B. approving of it afterwards, made A. his agent ab initio, and therefore shall be affected with the notice of A. (4). But though notice to a man's counsel is construed as notice to himself, yet where the counsel

(1) Merry v.
Abney, 1 Ch.
Ca. 38.
Sheldon v.
Drummond,
Ambl 624.
Coote v. Mammon, 2 Bro.
P. C. 596.
3 Atk. 646.
(2) Le Neve
v. Le Neve,
3 Atk. 646.
(3) Brotherton
v. Hatt, 2 Vera.
574.

(4) Jennings v. Moore, 2 Vern. 609. 1 Bro. P. C. 244. Vane v. Ld. Barnard, Gilb. Rep. 7.

counsel comes to have notice of the title in another affair, which it may be he has forgot, when his client comes to advise with him in a case with other circumstances, that shall not be such a notice as to bind the party (5) (0).

(6) Preston v. to bind the part Tubbin, 1 Vern. 286, 287. Lowther v. Carlton, 2 Atk. 139.

> (a) The rule laid down in Fitzgerald v. Falconbridge, Fitzgibbon, 207. requires the notice to be in the fame transaction, which rule is distinctly recognized by Lord Hardwicke in Warwick v. Warwick, 3 Atk. 291.

SECTION V.

L ASTLY, a trust is revived by a repurchase of the trustee, although a fine passed; for it being but a conveyance, it did not extinguish or separate the trust, but transferred both together, and in the gift of the land he gives all the interests and demands by reason of the land. And so, where a man wrongfully possesses himself of my goods, and sells them

in a market overt; if he afterwards buys these goods again, I may seize them in his custody (1) (p).

(1) Bovey v. Smith. 2 Ch. Ca. 126. 1 Vern. 60.

(p) The decree referred to in Bovey v. Smith, appears to have been reversed by the Lord Keeper, IVern, 144; but the reversal is referrable to the implied acquiescence of the cestuique trust. The rule stated by our author may therefore be considered as in no degree affected by such reversal; and indeed it seems to flow from the maxim of law, that no man shall be allowed to take advantage of his own wrong: upon the ground of which maxim it has been held, that if a disseisor alien, and a descent is cast, and afterwards the disseisor re-acquires the estate, the disseise may re-enter. Litt. 1. 39. Co. Litt. 242. a.

SECTION VI.

AS to the revocation of uses (q), it is a general rule, that things may be avoided and determined by the same ceremonies

(q) Powers of revocation of uses of lands are very frequent in merely voluntary conveyances, but have of late been disused in marriage settlements. Doubts having arisen whether such settlements are not fraudulent

nies and acts by which they were raised. That which passes by livery ought to be avoided by entry; that which passes by

dulent within the 27th Eliz.; Buller v. Waterhouse, Sir T. Jones, 94, 95. See Mr. Booth's opinion annexed by Mr. Hillyard to 6th ed. Shepherd's Touchstone. Powers of revocation in their creation are to be construed favourably, and therefore no express or technical words are necessary to the creating of such powers; but any expression which denotes an intent to reserve fuch power will be fufficient. See Bishop of Oxford v. Leighton, 2 Vern. 376. Lavender v. Blackstone, 3 Keb. 26. But if such power be once executed, that is, the old uses over the whole estate revoked, and new uses limited, such new uses cannot be revoked without an express refervation of a power for such purpose, Hele v. Bond, Pre. Ch. 474. See also Zouch v. Woolston, 2 Burr. 1136. 2 Vez. 211. A power of revocation may extend to all the limitations, or be restricted to a particular estate limited by the conveyance; as where the use is to A. for life, remainder over, with a power to revoke the estate for life only, this feems, fays Rolle, to be a good power; Thomson v. Freston, 2 Rolle's Abr. 262. pl. 1. A power of revocation may be either a power relating to the land, that is, a power limited to one that had, hath, or shall have an estate or interest in the land; which power is either appendant or in gross, or simply collateral; as where the party to whom the power is referved hath not, nor ever had any estate in the land; Edwards v. Slater, Hard. 415. Gilb. on Uses, 141. 143. Sanders on Uses and Trusts, 288. & seq. As to the difference of construction of such powers as are coupled with an interest, and fuch as are purely collateral, fee next Section.

avoided

I.

V

é.

-

e

d

t

1

1

1

ŗ

grant, by claim; that which passes by way of charge, determines in like manner by way of discharge. And so at common law, an use which was raised by a declaration or limitation, might cease by words of declaration or limitation (1). But an use executed by the statute differs not from a legal estate, and cannot be waived or determined without entry. Yet for the necessity, where the party himself is tenant for life, (as in the usual powers of revocation,) by the revocation the estate ceases without entry or claim; because he cannot enter upon himself, and an express act of revocation is as strong as any claim can be (2). And therefore, that which in a conveyance at common law is called a condition, by way of ufe is called a limitation, or a conditional limitation; because it has the effect of a limitation to determine an estate of freehold without entry (3). And by the fame conveyance as the ancient uses are revoked, by the same conveyance other uses may be limited or raised; for since the ancient uses cease ipso facto by the revocation, without claim or other act, the law will adjudge a priority of operation in the deed, though

(1) Ld. Bacon's Readings on Statute of Uses, 314.

(2) Digges' Case, 1 Rep. 174. 2.

(3) Co. Litt. 237, a. 203, b. Butler's note(1) Moore, 612. it be sealed and delivered, and takes effect altogether. And therefore it shall be first in construction of law, a revocation and ceasing of the ancient uses, and then a limitation or raising of new; for the law will marshal several acts done at the same time, that all may stand (4). But unless he reserves a power expressly to limit new uses, he can only revoke (r).

(4)Digges' Cafe 1 Rep. 174. Fitzwilliam's Cafe, 6 Rep. 32, 33.

> (r) By which must be understood, that the old conveyance cannot be charged with new uses, unless a power to limit new uses be referved. This proposition is agreeable to the decision of the court of Common Pleas; see Anon. 1 Str. 584; but it is in direct oppofition to the authority of Sir Wm. Blackstone, 2 Com. 339., who states the limitation of new uses to be incident to the power of revoking the old uses. The learned commentator refers to Co. Litt. 237. The paffage on which he relies, is, that if the covenantor who had an estate for life revoke the uses according to his power, he is feized again in fee fimple without entry or claim. The confequence of revocation, as thus stated by Lord Coke, is certainly good law; and as the uses of the original conveyance are deftroyed, he may of course limit new uses by a new grant or covenant on confideration; but the doubt is, whether fuch new uses can take effect, as uses springing out of the original conveyance. Mr. Powell, who has brought together the cases upon this point, conceives that they cannot; for that the old uses, ceasing by the revocation, and there being no express power to declare new uses, the estate out of which the old uses arose becomes free from

from them; for that estate was only bound by the uses limited thereon, with power of revocation, and the consideration extended to those uses only; and consequently after revocation it was freed from them. Powell on Powers, 279. And the case of Ward v. Lenthal, 1 Siders. 343, seems to bear out this opinion; for in that case, the deed limiting new uses having reserved a power of revocation, but not a power to limit new uses, the subsequent declaration of new uses was held bad. But the cases referred to in Colston v. Gardner, 2 Ch. Ca. 46. and in Fowler v. North, 3 Keble, 7. are certainly irreconcilable with Mr. Powell's conclusion, and our author's proposition, even qualified as above.

SECTION VII.

THESE powers of revocation were only allowable in conveyances by way of use (s), for in a legal conveyance such a power would have been repugnant (1). And they are a law which a man puts upon himself, by virtue of the power

(1)Co.Litt.237.

(s) By this must be understood a statute use; for if Λ , enseoff B, and his heirs to the use of B, and his heirs, the use will be executed at common law, and the proviso or power of revocation by the seoffor would be repugnant and void; Touchstone 525.

which

(2) Scrope's Cafe
10 Rep. 144.
Kibbett v. Lea,
Hob. 312.
Bath and Mon.
tague's Cafe,
3 Ch. Ca. 55.
65. 108.
Duchefs of
Albermarle
v. Bath,
2 Freem. 121.
(3) Bath v.
Montague,
3 Ch. Ca. 108.
Physic v. Penrice

which every one has of disposing of his own as he pleases; and therefore they ought to be performed in all the incidental circumstances required by the proviso (2), viz. as to subscription, witnesses, or the like; for these ceremonies were appointed by him to prevent fraud and surprise (t). And there can be no revocation in equity (3), where it is not a good revocation at law (u), unless there be a clear

3 Ch. Ca. 108. Prgott v. Penrice, Comyns' Rep. 250. Pre. Ch. 471. Zouch v. Woolston, 2 Burr. 1136.

- (t) That uses may in favour of the intent be revoked by construction or implication; see Scrope's Case, 10 Rep. 144. E. of Leicester's Case, 1 Ventr. 280.
- (u) With respect to what shall be deemed a good execution of such power, it seems agreed, that it may be executed by several deeds, if the first executed do not extinguish the power; see E. of Leicester's Case, 1 Ventr. 280. It seems also agreed, that the power of revoking the old and limiting new uses, may be executed at different times over different parcels of the estate subjected thereto; see Zouch v. Woolston, 2 Burr. 1136, in which the cases upon this point are brought together; see also Powell on Powers, 262. A power of revocation may also be executed conditionally or pro tanto. Thorne v. Thorne, 1 Vern. 141. Perkins v. Walker, 1 Vern. 97. It may also be executed absolutely, or with power of revocation. Adams v. Adams.

clear intention of the party to revoke, which he was prevented carrying into execution purfuant to the power, by fraud or accident (4). But there is a difference betwixt a power referved to a stranger, and to the owner himself. For a power to alter or charge the estate of another shall be construed strictly, and shall never be extended beyond the letter and intention of the parties; because it is to affect the estate of a third person (5). But a power over a man's own estate is parcel of the old dominion referved to him, and for the benefit of the party himself, and voluntary, and therefore shall be expounded favourably, many estates depending upon fuch powers (6). Also a power referved to himfelf, who has a present estate, or shall have by the ceasing of the uses, favours of an interest, and may be extinguished by a feoffment of the land, or release to him that has the freehold: for he

(4) Bath v. Montague, 3Ch. Ca. 108.

(5) Sayle v. Freeland, 2Ventr. 350. E. of Leicester's Case, 1Ventr. 279.

(6) Sayle v. Freeland, 2 Ventr. 350. Fitzgerald v. L. Falconbridge Fitzgib. 7.

Adams, Cowp. 651. It also feems agreed, that a power to lease the premises is incidental to the power to revoke the uses; Goodright v. Cater, Dougl. 467, 468. I cannot conclude this note, without recommending the reader to consult Mr. Powell's Essay on the Law of Powers, which brings together the various nice and abstruse learning which belongs to this subject.

Vol. II.

M

who

(7)Digges'Cafe, 1 Rep. 174. a. (8)Digges'Cafe, 1 Rep. 174. Willisv.Shorral 1 Atk. 474. who raises and limits the use, shall be supposed the donor (7); but a power to a stranger (8) is merely collateral (x).

(x) If the power be fimply collateral, the fine or feoffment of him who created it will not extinguish it. Gilb. Uses, 144. Willis v. Shorral, 1 Atk. 474. Neither will a release by him to the owner of the freehold. Digges' Case, 1 Rep. 174. Nor can he, in executing it, reserve to himself a power of revocation. Wall v. Thurborne, 1 Vern. 355.

SECTION VIII.

(1) Gilb, Lex. Præjoria, 264. IN case of merger of terms, the diversity formerly taken (1) was this, If a man has the same interest, and absolute dominion and property in the whole inheritance (y), as he has in the term, or power for

(y) The general rule is, that where there is no legal estate standing out, but only an equitable charge, and the inheritance comes to the person entitled to the charge, the charge shall merge; but the estate of inheritance must be an estate in see simple, and not merely

for raising money out of the inheritance, there it must merge; for a man cannot have a power to raise money merely for my benefit out of that which is mine. But if there be any difference in the two interests (z), or any other person intermediate (2), then there can be no merger; for if there be any merger in the first case, it will change the intent of the conveyance; and in the other case, there being an intermediate estate, there is no merger at law, no more is there in a court of equity in the case of a trust. But it has

(2) Chamberlain v. Ewer, 2 Builft, 11. 1 Brownl. 134. Deighton v. Grenvil, Comberbach. 81 E. of Bedford v. Ruffell, Poph. 3. Plunkett v. Holmes, 1 Lev. 11.

ly an estate tail. Duke of Chandos v. Talbot, 2 P.W ms. 604. Chester v. Willes, Ambl. 246. With respect to mergers of charges by the particular tenant paying them off, it seems that a tenant for life, discharging an incumbrance, shall not be presumed to have intended to benefit the inheritance; but that a tenant in tail, discharging an incumbrance, shall be presumed so to intend; but the presumption in either case may be repelled. See Jones v. Morgan, t Bro. Ch. Rep. 206.

(z) As if one interest be in auter droit, and the other not. Co. Litt. 338. b. 4 Leon. 37. Cage v. Acton, 1 Salk. 326. Platt v. Heap, Cro. Jac. 275. See 15 Viner's Abridgment, Merger, A. 2. p. 362. So if the husband be possessed of the term in right of his wife, his purchase of the see will not extinguish the lease, Gong v. Radford, Hob. 3.

(3) Thomas v. Keymish, 2 Vern. 348. Brown v. Gibbs, 2 Freem. 233, Powell v. Morgan. 2 Vern. 90.

been fince held (3), that where the inheritance descended to the daughter, as heir, who was also entitled to the trust of the term for her portion, so that she had the fame dominion over both, yet there could be no merger of the term; for that was lodged in truftees, and fo not merged at law, nor confequently in equity. For where an infant has two rights in her, this court, which is to take care of infants, will always preferve that right which is most beneficial for the infant. And in this case it was for the interest and advantage of the infant, that the portion should be looked upon as a continuing and fubfifting charge, and not fink into the inheritance; because it might have been a means to have preferred her in marriage during her infancy, before she was capable of making a fettlement of her real estate; and likewise when of the age of feventeen (4), she was capable of disposing by will of her personal estate, either for payment of debts, or in legacies amongst her relations (a).

(4) Bishop v. Sharpe, 2 Vern. 469. Hyde v. Hyde, Pre. Ch. 316.

⁽a) In the case of Thomas v. Keymish referred to, as also in the case of the D. of Chandos v. Talbot, 2 P. Wms. 604. Powell v. Morgan, 2 Vern. 90, the daughter

daughter had by will disposed of the money with which the estate was charged, which, surnishing distinct evidence of her intention to keep the term separate from the inheritance, brings it within the distinction stated by Lord Hardwicke; that when the owner of the see in which the charge would otherwise merge, manifests his intent that the charge should subsist, his intent, if clear, shall prevail. Chester v. Willes, Ambl. 246.; see also Lord Compton v. Oxendon, 4 Bro. Ch. Rep. 397. 2 Vez. Jun. 264. For mergers are odious in equity, and never allowed unless for special reasons. Philips v. Philips, 1 P. Wms. 41. With respect to the doctrine of merger, as applied to copyhold estates for life or estates tail, see 13 Vin. Ab. I. Merger.

CHAP. VII.

Of the Office and Duty of a Trustee.

SECTION I.

IT follows, that we treat of the office and duty of the trustee, and how far his power extends. And here regularly, no act of the trustee shall prejudice the cestuique trust (a); but the trustee must, especially

(a) This proposition, that no act of the trustee shall prejudice the cestuique trust, demands attention; I shall therefore consider the several modes by which prejudice might be induced by acts of the trustee, unless courts of equity interposed their protective jurisdiction in favour of the cestuique trust; and endeavour to point out to what extent courts of equity have interposed. The legal estate being in the trustee, he might prejudice his cestuique trust, by aliening, by incumbering, by altering, or by forfeiting the estate, or by refusing to accept the trust.

With respect to his power to prejudice his cestuique trust by alienation, the single case in which his alienation of the estate can bind the cestuique trust is, where being in possession of the estate, he conveys it for a valuable consideration, and without notice: in which case the purchaser will be entitled

especially in equity, make good the trust (b). And the law seems to be the same

to hold the estate against the cestuique trust. Pye v. Gorge, IP. Wms. 128. I Bro. P. C. 359. Vernon v. Vandey, Barnard. 303. Watson v. Corbett, Rep. Temp. Finch, 411. As to incumbrances, it seems agreed that mortgagees for valuable consideration, and without notice of the trust, are to be considered as purchasers, a mortgage being a specific lien; but, as to specialty or judgment creditors, who have only a general lien, they are not in equity allowed to hold against the cestuique trust. Finch v. Earl of Winchelsea, IP. Wms. 278. Medley v. Martin, Finch's Rep. 63.

In confidering the power of a truftee to change the nature of a trust estate, it may be material to distinguish those cases in which the cestuique trust is fui juris, from those in which he is not fui juris. In those cases in which the cestuique trust is sui juris, I take it to be clear that the truftee cannot change the nature of the estate; as by converting money into land, or land into money, at least, so as to bind and exclude the cestuique trust from remedy against the trustee perfonally. But in those cases in which the cestuique trust is not fui juris, it is very frequently necessary to the interests of such a cestuique trust, that the trustee should be armed with fuch a power; and the true criterion in fuch cases is, whether the interest of the cestuique trust required the conversion. For the distinctions upon this point, fee 1st vol. p. 88; and Mason v. Day, Pre. Ch. 319. Pierson v. Shore, 1 Atk. 480. Witter v. Witter, 3 P. Wms. 100, 101. Rook v. Warth, I Vez. 460. Oxendon v. Lord Compton, 4 Bro. Ch. Rep.

fame of the act of God; for if the truftee of a legacy dies before the testator, this fhall

Rep. 231. 2 Vez. Jun. 69, 261. That the trustees, postponing or accelerating the fale of the trust estate, shall make no alteration in the interest of the cestuique trust, see Hawkins v. Chapple, 1 Atk. 623. That a trustee to fell shall not gain any advantage by being himself the person to buy, see Whichcote v. Lawrence, 3 Vez. 740. and the Cases there cited.

With respect to acts of the trustee which work a forfeiture of the estate, I shall blend the doctrine of forfeiture, which is an escheat pro delicto tenentis, with that of escheat ob defectum tenentis; conceiving that though there may be distinctions as to these points between the effect of forfeiture incurred by the cestuique trust in cases of treason and in cases of selony, there is none as to the truftee; for that the legal estate being in him, it is forfeited by his treason or felony, and also escheats pro defectu tenentis: but whether the forseiture be subject to the trust, is a point upon which a difference of opinion feems to have prevailed. I am aware that Chief Baron Comyns, in his valuable Digeft, title Forfeiture, B. I. states, That "a man does not for high treason forfeit lands which he holds as trustee." But this opinion cannot he reconciled with those cases in which the only question has been, Whether the legal estate being by the forfeiture vested in the crown, the crown was not bound to execute the trust in equity? In Wikes' Case, Lane 54, it was held that the crown was not fo bound; fo also, in Jenkins 190, Ca. 92. Hard. 466, Bro. Feoffment al. Uses, pl. 31. Viner's Ab. Uses, pl. 4, in a note; and the general reason assigned is, that the

So if (1) Eales v. shall not prejudice the legatee (1). a trustee of land die without heir, though the

England, Pre. Ch. 200. See alfo, Oke v. Heath, 1Vez. 135.

the king cannot be a trustee. This series of authority is, however, supposed to be shaken by the dieta of Lord Bridgeman, in Geary v. Bearcroft, Carter 67; and Trevor, master of the rolls, in Eales v. England, Pre. Ch. 202; and as these dicta weighed with Lord Mansfield in the much celebrated case of Burgess v. Wheate, 1 Bla. Rep. 123, notwithstanding the observations upon them by the master of the rolls, Sir Thomas Clarke, it may be material to remark, that in Lord Bridgeman's own manuscript notes of his judgments, whilst chief justice of the common pleas, compositions far exceeding Carter's account of them in copioufness, depth, and correctness, more particularly in the case of Geary v. Bearcroft, there is not an iota which imports an opinion, that upon escheat the lord comes in fubject to any trust. I am indebted for this observation to the liberal communication of Mr. Hargrave, who is in possession of the above manuscript.

And with respect to what is reported to have been stated by Trevor, master of the rolls, it may be sufficient to remark, that it was an obiter dictum.

As to the refusal of a trustee to accept the trust, a court of equity will in fuch cases interpose, and either appoint new trustees, or take upon itself the execution of the truft.

(b) Lord Hobart is stated to have been of opinion, that an action at law might be maintained against the trustee for breach of trust; see I Eq. Ca. Ab. 384. in note: but this opinion is inconfistent with Lord Hardwick's (2) Eales v.
England, Pre.
Ch. 200. 202.
1 Eq. Ca. Ab.
note, 384.
Geary v. Bearcroft, p. Ld.
Bridgeman,
Carter, 67.
But fee note (a).
(3) Hix v. Attorney General,
Hard, 176.

(4) Conway v. Shumpton, 19 Jan. 1711, 21 Vin. Ab. 512. (5) Earl of Chefterfield v. Lady Cromweil, 1 Eq. Ca. Ab. 287.

the lord by escheat will have the land at law: yet it shall be subject to the trust in equity (2). So if A. puts out 100l. at interest, in the name of B., who after becomes a felo de se; A. may be relieved against the king upon this trust in equity, upon the statute of 33 H. 8. cap. 89 (3). Yet if an equity of redemption is conveyed to A. in trust for payment of debts, and the furplus to B., and A. agrees with the mortgagee to turn interest into principal; this agreement of the trustee shall bind B. though he was no party to it (4). And fo an infant shall be bound in such case by the act of his truftee or guardian (5); for we must distinguish betwixt importunate gain, as if the account were stated every

wick's definition of a trust, which is, that it is such a confidence between parties, that no action at law will lie, but is merely a case for the consideration of courts of equity. Sturt v. Mellish, 2 Atk. 612. That the trustee is liable in equity for a breach of trust, was expressly determined in Vernon v. Vandrey, Barnard. 303; but it is material to observe, that even in equity the cestuique trust is considered but as a simple contract creditor in respect of such breach of trust, Vernon v. Vawdrey, 2 Atk. 119, unless the trustee has acknowledged the debt to the trust estate under hand and seal. Gissord v. Manley, Forrest. 109.

fix months, on purpose to load it; and where the interest is run up to a bulky sum: for here interest ought to be allowed for delay and forbearance, as well as in any other case whatsoever.

SECTION II.

BUT it feems a certain rule, that what a trustee, or any other, is compellable to by suit, he may do without suit (c); as

(c) It feems scarcely necessary to observe, that considerable caution is requisite in the application of this rule: when a trustee does any act upon the notion that he would be compellable to do it by suit, he takes upon himself to decide what would be the decree of the court; and in such case he has no reason to complain, if made subject to any loss which his cessure trust may have sustained from his having misapprehended the law of the court. But it may happen that a trustee may be correct in his apprehension of the law of the court, and yet not be justified in taking upon himself to proceed upon it without the fanction of the court; as where a grandsather having bequeathed the residue of his personal estate to his grandchildren at twenty-one, and directed the trustees to apply the produce in the

mean

(1) Bowater v. Elly, 2Vern. 344.

to join with cestuique trust in tail in a feossment (1); for they are trustees merely to preserve his estate. So there being a remainder over in trust to raise portions for daughters, if there were no issue, and there being a daughter, upon giving security for the daughter's portion, the trustees

mean time for the maintenance of fuch grandchildren, and the father was one of the trustees, who being known to the other trustees not to be of ability to maintain his children, one of the trustees expended 400l. in their maintenance, previous to any report as to the ability of the parent to maintain them; which difburfement Lord C. Thurlow refused to allow. Andrews v. Partington, 3 Bro. Ch. Rep. 60. Yet in fuch case, had the father been found not to be of ability to maintain his children prior to any application of the interest for such purpose, such application would, as of course, have been directed; but the trustee having taken upon himself to judge of the parent's sufficiency in such particular, was confidered to have no right to an allowance, which the court would not have decreed without the previous inquiry, though he had drawn a correct conclusion as to what would have been the refult of fuch inquiry. I am aware that this case is confidered as a case of great hardship; I cannot however bring myfelf to think, but that the decision is necessary to fecure to infants the full benefit of that protective interpolition which courts of equity are bound to afford them. The respectable character of the trustee who had applied the produce of the fund in the manner directed

trustees shall be compelled to join in the recovery (2). So trustees in a marriage-settlement for preserving contingent remainders, (there being no issue,) may be decreed to join in a sale (d), the settlement being only of an equity of redemption, and the wise consenting to the sale (3). But the husband and wise being married twelve years, and having no issue, the

(2) Frewin v. Charlton, 1 Eq. Ca. Ab. 386.

(3) Platt v. Sprigg, 2 Vern. 303.

rected by the will, however it may dispose one to lament the effect, ought not to be allowed to influence the discussion, nor to control the application of the general rule. But see Aspinal v. Aspinal, 1786; in which case, such allowance seems to have been directed in the event of the father's appearing not of ability to maintain his child; see also Franklin v. Green, 2Vern. 137, in which the trustee was allowed an apprentice fee. But see Smee v. Martin, Bunbury 136, contra.

(d) There are feveral other cases in which the court has exercised its discretion, by directing trustees to join in destroying contingent remainders, as in Basset v. Clapham, I P. Wms. 358, where the settlement was voluntary, and the bill was by creditors; so in Winnington v. Foley, I P. Wms. 536, where the new uses to be limited upon the recovery were more beneficial to the samily than the existing limitations. But, in the exercise of this discretion, the court proceeds with great circumspection; and therefore if the tendency of destroying the remainders be prejudicial to the samily, the court will not direct the trustees

(4) Davis v. Weld, 2 Vern. 181. court will not force the trustees to join in a sale, though for payment of their debts; for that people have been married near twenty years without issue, and after have had children (4). And if trustees appointed to preserve contingent remainders, join in a conveyance to destroy the remainders before a son is born, this is a plain breach of trust; and whoever claims under this conveyance having notice of the trust, or by a voluntary settlement, shall be liable to make good the estates (5).

(5) Manfel v. Manfel,

P. Wms. 684. Forrest. 259. Pyev. Gorge, 1 P. Wms. 128. 1 Bro. P. Ca. 359.

trustees to join, unless in the aforementioned cases. Townsend v Lawton, 2 P. Wms. 379. Symance v. Tattam, 1 Atk. 613. Woodhouse v. Hoskins, 3 Atk. 22. Barnard v. Large, 1 Bro. Ch. Rep. 534. But though the court will in some cases resuse to direct the trustees to join, it will not in all such cases punish the trustee if he actually concur in barring the contingent remainders. See Woodhouse v. Hoskins, 3 Atk. 22. As where, upon a subsequent remainder to the right heirs, a collateral relation only was affected by it. Tipping v. Pigott, 1 Eq. Ca. Ab. 385.

SECTION III.

As to the allowances to be made to the trustee, regularly (e) he is to have nothing for his own labour and pains, though some have thought this a great hardship (1). But if a trustee, sued concerning the trust in Chancery, obtain a dismission, and have costs paid him (f), as in course; but the costs allowed him, and taxed, are short of his real costs; and after a bill is brought by cestuique trust, to have an account of his disbursements,

(1) How v.
Godfrey,
Rep. Temp.
Finch 361.
Palmer v.
Jones, 1 Vern.
144.
Robinfon v.
Pett, 3 P. Wms.
250.
Scattergood v.
Harrifon,
Mofely,
128, 130.

- (e) But though a trustee is not in general entitled to an allowance for his trouble, quere, Whether he may not, prior to his acceptance of the trust, stipulate for an allowance? See Gould v. Fleetwood, Mich. 1732, stated in a note, 3 P. Wms. 250, and Aylisse v. Murrey, 2 Atk. 60. That the court would not give essent to such an agreement between mortgagor and mortgagee, see French v. Baron, 2 Atk. 120. But that an executor in India is entitled to the allowance which, in India, is made to executors for their trouble, see Cheetham v. Ld. Audley, 4 Vez. 74.
- (f) If a trustee has not misbehaved, the rule is to allow him his costs, Perrott v. Treby, Pre. Ch. 254. But if he has misbehaved, the court will not make him such

(2) Amand v. Bradburne, 2 Ch. Ca. 138.

(3) See Hetherfell v. Hales, 2 Ch. Rep. 83. Ramfden v. Langiey, 2 Vern, 536. he shall be allowed his true and necessary costs in the former suit, and not be concluded, &c. (2). And the law is the same of a mortgagee; for since the keeping only is given gratis, it is plain, that all the expences laid out upon the charge ought to be repaid (3). And although, where a mortgagee or trustee manage the estate themselves, there is no allowance to be made them for their care and pains; yet, if they employ a skilful bailiss (g), and give him 201. per annum, that must be allowed, for a man is not bound to be his own bailiss (4).

(4) Bonithorn v. Hockmore, 1Vern. 316.

Godfrey v. Wation, 3 Atk. 518.

fuch allowance. Trix v. Quarterly, MSS. 16th July 1786. And, query, If in a contested case, the court would not charge a trustee with the costs of a suit which his misconduct had occasioned? See Perrott v. Treby, Pre. Ch. 254.

(g) Though a trustee may appoint a bailiff, it seems he is responsible for his sufficiency, unless the will or deed creating the trust empower the appointment; in which case, the trustee is only bound to see that his agent be a proper and solvent person at the time of appointment. Sutton the Marshal's Case, 12 Mod. 560. See also Routh v. Howell, 3 Vez. 565.

DOOD REDO SECTION IV.

TOR will the court ever charge a truftee with imaginary values, but he shall be charged as a bailiff only. And although very fupine negligence might indeed in some cases charge a trustee with more than he had received, yet the proof must then be very strong (1). So a trustee for a charity is no otherwise or further chargeable, than another truffee is, viz. for fo much as he receives (2). So a mortgagee shall only account for what he actually did make, or might have done (3), had it not been for his wilful default (b). And if a trustee is robbed of the money he received, he shall be allowed it on account, the robbery being proved, although the fum is only proved by his own oath, for he was to keep it but as his own (4). in case of a factor; for he cannot possibly

- (1) Palmer v.
 Jones 1 Vern.
 144.
 Harnard v.
 Webster, Sel.
 Ca. Ch. 53.
 (2) Mano v.
 Ballett, 1 Vern.
- (3) Anon. 1 Vern. 45. Chamberlain v. Chamberl in, 1 Ch. Ca. 258.
- (4) Morley v. Morley, 2 Ch. Ca. 2. fee Routh v. Howell, 3 Vez. 565.

have

(b) The rule here stated appears to be the result of the cases upon the point; and what will amount to that degree of default which will charge a mortgagee beyond his receipts, must necessarily depend upon a variety of circumstances, not easily capable of enumeration. The more prominent instances of such default Vol. II.

(5) Co. Litt. 89. a Southcote's Case, 4 Rep. 84. a.

have other proof (5). And so it seems of an executor. Nor is this without a good foundation in reason; for the contract is not for the trustees, but the party's own advantage, and it was his fault to choose such a one. And the interruption of acts of friendship do not oblige to restitution(i). But otherwise of a carrier, for he hath his hire, and thereby implicitly undertakes the safe delivery of the goods committed to him (6).

(6) Co. Litt. 89, 2. Southcote's Case, 4 Rep. 83.

are where the mortgagee enters upon the estate, and thereby keeps the other creditors out, and yet allows the mortgagor to receive the rents and profits; in which case, he shall be charged with all the profits he might have received from the time he had notice of the subsequent incumbrances. Coppring v. Cooke, IVern. 270. Bentham v. Haincourt, Pre. Ch. 30. Maddox v. Wren, 2 Ch. Rep. 109. See also Duke of Buckingham v. Sir Robert Gayer, IVern. 258. Chapman v. Tanner, IVern. 267. So if the mortgagee in possession, without assent of the mortgagor, assign his mortgage to an insolvent person, he shall answer for the profits received both before and after the assignment, though assigned for his own debt. I Eq. Ca. Ab. 328. c. 2.

(i) By the civil law, several distinctions appear to have prevailed upon this point. In contractibus interdum dolum solum, interdum et culpam præstamus: Dolum, in deposito; nam, quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus nist sorte et merces accessit:

accessit : tunc enim (ut est et constitutum) etiam culpa exhibetur; aut si hoc ab initio convenit, ut et culpam et periculum prastet is, penes quam deponitur. Sed ubi utriusque utilitas vertitur, ut in empto, (ut) in locato, (ut) in dote, (ut) in pignore, (ut) in societate, et dolus et cuipa prastatur. Dig. lib. 13. ti. 6. 5. 2. A further distinction also prevailed in the civil law upon this point. Commodatum autem plerumque solam utilitat m continet ejus, cui commodatur; et ideo verior est Quinti Mutii sententia, existimantis, et culpam prastandam et diligentiam. Dig. ubi supra. With respect to the distinctions upon this point allowed by the law of England, they are flated in the great case of Coggs v. Bernard, 2 Ld. Raym. 909. In which cafe, Lord Holt, C. J. observes, that there are fix forts of bailments. 1st, A bare naked bailment of goods delivered by one man to another, to keep for the use of the bailor; which he calls a depositum. 2dly, Where goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. 3dly, Where goods are left with the bailee, to be used by him for hire; which is called locatio & conductio. 4thly, When goods or chattels are delivered to another as a pawn, to be a fecurity to him for money borrowed; which is called a pledge. 5thly, When goods or chattels are delivered to be carried, or fomething to be done about them for a reward to be paid to the bailee. 6thly, When there is a delivery of goods or chattels to fomebody who is to carry them, or to do fomething about them gratis.

To those who have already perused the admirable essay on the Law of Bailments, by Sir William Jones, this subject, and the distinctions which belong to it, cannot but be familiar; to the reader who has not yet derived the satisfaction which that essay will commu-

N 2

nicate, to every mind possessed of good taste and nice discrimination, I beg to recommend that work, as illustrative of a truth too frequently contested, that the exertion and display of the most brilliant talents are not inconsistent with the severest and apparently least interesting investigation of the law of England.

SECTION V.

RUT where they are more than one, there is a difference between trustees and executors. For truffees have all equal power, interest, and authority; and cannot act separately, as executors may, but must join, both in conveyances and receipts; for one cannot fell without the other, or defire to receive more of the confideration-money, or to be more a truftee than his partner. And therefore it is against natural justice to charge themfor each other's receipts, unless in case of necessity, where they so join in a receipt, as not to be distinguished what has been received by one, and what by the other, there, from their own neglect or default

fault (k), both shall be charged with the whole (1). As if a man should blend his Fellowes v. Owen, 2 Vern. money with mine, by rendering my property uncertain, he loses his own. But Murrell v. Cox, executors have each an absolute power over the whole, and therefore if they join (1) they trust one another (2), et sic diversity.

504. 515. 1 P.Wms. 81. 2 Vern. 570. Townly v. Sherborn, Bridgem. 38. Cro. Car. 312. Leigh v. Barry, 3 Atk. 584. Ex parte Belchier, Ambl.

218. (2) Churchill v. Lady Hobson, 1 P.Wms. 241. 1 Salk. 318. Apl, n v. Brewer, Pre. Ch. 173. Duke's Charitable Uses, 66. Ex parte Belchier, Ambl. 219. Scourfield v. Howes, 3 Bro. Rep. 90.

(k) So where one trustee, having received the trust money, hand it over to his companion, he shall be charged; for where, by any act or by any agreement of a trustee, money gets into the hands of his companion, whether a truftee or co-executor, they shall both be answerable. Sadler v. Hobbs, 2 Bro. Ch. Rep. 116. Keble v. Thompson, 3 Bro. Ch. Rep. 112.; Hovey v. Blakeman, Rolls, E. T. 1799. but fee Attorney-General v. Randall, 21 Vin. Ab. 534. pl. 9.; fo if a trustee be privy to the embezzlement of the trust fund by his companion, he shall be charged with the amount. Boardman v. Mosman, 1 Bro. Ch. Rep. 68. It may be material to observe, that the principle of the diffinction between executors and truftees, extending to the affignees of a bankrupt, it has been held, that the furviving affignee of a bankrupt is not chargeable for money received by his companion, though he join in the receipt, and although they agree, that the money from time to time received by them should be placed in the hands of a banker for fafe cuftody. Ex parte Singleton, Aug. 10. 1791, stated in a note by Mr. Cox, 1 P. W. 84.

(1) So if they agree that each of them shall have the management diversity. Yet a difference has been taken in the case of executors, as to creditors, and as to legatees (m).

management of a particular part of the estate, each shall be liable for the whole. Gill v. Attorney-General, Hard. 314. With respect to the general proposition, it may be considered as considerably broken in upon, by Lord Northington's judgment in Westley v. Clarke, 25 June 1759; but it is observable, that the determination in that case has been doubted; see Sadler v. Hobbs; but see also Scourfield v. Howes, 3 Bro. Ch. Rep. 90. It is however further observable that the case of Westley v. Clarke involved many circumstances, the particularities of which might be allowed to weigh without violence to the general rule.

(m) This diffinction was treated by Lord Thurlow, Chancellor, in Sadler v. Hobbs, as a very odd diffinction, it feems however to have been taken and allowed in the case of Gibbs v. Herring, Pre. Ch. 49.

SECTION VI.

AND in an action of account, there must be either a privity in deed by the consent of the party, (as where he is his bailiss or receiver, for against a wrong-doer

doer an account will not lie,) or a privity in law ex provisione legis (n), as against a guardian (1). And at law, if the de- (1) Co. Litt. fendant is charged as bailiff of goods ad merchandizand', he shall answer for the increase, and be punished for the negli-

(n) At common law, though an action of account could be maintained against a bailiff, receiver, or guardian, or in favour of trade between merchants, yet it could not be maintained by or against their reprefentatives; Co. Litt. 90. b. The St. 13 Ed. 3. c. 23. therefore gave it to the executors of merchants; the 25 Ed. 3. c. 5. extended it to the executors of executors; and 31 Ed. 3. c. 11. to administrators; and now by 3 & 4 Ann. c. 16. it may be brought against executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other as bailiff, for receiving more than his share, and against their executors and administrators. See Buller's Ni. Pri. 127. 6th ed. But though an action of account could not at common law have been maintained against the representatives of bailiffs, receivers, or guardians, yet a bill in equity for an account might be fuftained; and fuch appears to have been the usual remedy, prior to the above remedial statutes. See 1 Eq. Ca. Ab. 5. note (n); and it is still confidered as the most ready and effectual way to fettle complicated accounts, as a discovery may thereby be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce.

gence (0), and have his expences and factorage allowed him. But if he is charged as receiver ad computandum, he shall answer only for the money, or thing delivered (2). So in Chancery, an executor or trustee not being bound to lend, &c. if he do lend it is at his peril (p); and if

(2) Rolle's Ab. 125. 1 Com. Dig. 102.

144

- (0) That is, if he retain the fund in his hand when he might improve it, I Rolle's Ab. 125. l. 40, or does not improve it so much as he might; I Rolle's Ab. 126. l. I. or sell the goods purchased at an under rate; I Rolle's Ab. 126. l. 4. or upon credit without authority; Anon. 2 Mod. 100. but he shall be excused, if he can upon oath shew his conduct to have been regulated by prudent considerations, I Rolle's Ab. 126. l. 35. except when he exceeds his authority, as by giving credit. Barton v. Sadock, I Buls. 103. Anon. 2 Mod. 100.
- (p) The principle upon which this distinction proceeds, is so inconsistent with every notion of the character and duty of a trustee, that it is extremely dissipute to conceive how it acquired the weight which in some cases it appears to have received; see Lynch v. Cappy, 2 Ch. Ca. 35. and Cartwright's case cited in Ratcliffe v. Graves, 2 Ch. Ca. 152. 1 Vern. 197. and Adams v. Gale, 2 Atk. 106. It was, however, very solemnly considered and denied to be the law of the court by Lord Thurlow, C. in Newton v. Bennett, 1 Bro. Ch. Rep. 359; so that an executor or trustee may now be considered as chargeable in equity with interest, whenever he appears to have made interest.

if it be by that means loft, he shall answer the same out of his own estate, and therefore as he shall bear the loss, he shall have the gain. But if the trustee or executor were an insolvent person at the time of placing out the trust-money in the sunds, or on other security, whereby he gains considerably; there the cestuique

terest. Perkins v. Bayntum, I Bro. Ch. Rep. 375. Treves v. Townshend, 1 Bro. Ch. Rep. 384. which is agreeable to many former decisions. Radcliffe v. Graves, 1 Vern. 196. 2 Ch. Ca. 152. Lee v. Lee, 2Vern. 548. But he shall not only be charged with interest, but if he appear to have employed his trust money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of fuch profits. Brown v. Litton, 10 Mod. 21. Forbes v. Ross, 2 Bro. Ch. Rep. 430. see also Massey v. Davies, 2 Vez. Jun. 317. Sammes v. Rickman, 2 Vez. Jun. 36. And it has further been held, that if a truftee or executor retain money in his hands for any length of time, which he might by application to the court, or by vesting in the funds, have made productive, he shall be charged with interest thereon. Bird v. Lockey, 2Vern. 744. Perkins v. Bayntum, I Bro. Ch. Rep. 375. Littlehales v. Gascoigne, 3 Bro. Ch. Rep. 73. Franklin v. Frith, 3 Bro. Ch. Rep. 433. That an executor's investing money in the funds, and appropriating the same, shall not be liable to the fall of stocks. See ex parte Champion, cited in Hutcheson v. Hammond, 3 Bro. Ch. Rep. 147. Franklin v. Frith, 3 Bro. 433. Cow. per v. Douglas, 2 Bro. 231.

(3) Bromfield v. Wytherly, 1 Eq. Ca. Ab. 398. Pre. Ch.

trust shall have the whole benefit gained thereby, as he only could have borne the loss, aliter e contra (3). And this is a fixed rule of the court, and they will not change it, even where the executor calls in the money on good fecurity (q). So where a factor, who is in nature only of a trustee for his principal in equity, though he has the right at law, upon his account, demanded according to custom allowance for fo much paid for customs to the king in India, which it was infifted he had never paid, the factor shall have the benefit of the customs; for it was a duty to be paid, and the employer could make no title to it against him that was in posfession, and he that has possession has right against all but him that has the very right (4). Otherwise of customs stolen from our own king; for that could not be called a custom, being grounded upon fraud, and therefore the court will order, that defendant should answer, whether he paid the custom or not (5).

(4) Smith v. Oxendon, 1 Ch. Ca. 25. Knipe v. Jeffen, 1 Ch. Ca. 76.

(5) Borr v. Vandel, 1 Ch. Ca. 30.

(q) With respect to the right of an executor to call in a debt bearing interest, Lord Thurlow, Chancellor, conceived that an executor had an honest discretion so to do, if he thought the same in hazard. Newton v. Bennett, I Bro. Ch. 361. But see Taylor v. Gerst. Mosely 98.

stall to beling ask al

SECTION VII.

A ND if a trustee or executor compound debts or mortgages, or buy them in for less than is due upon them, he shall not take the benefit of it himself (1), but other creditors and legatees shall have the advantage of it (r); and for want of them, the benefit shall go to the party who is entitled to the surplus. So of an heir (2), unless he bought it to protect an incum-

(1) Anon, t Salk, 155. Darey v. Hall, 1 Vern. 49. Plowman v. Plowman, 2 Vern. 289.

(2) Braithwaite, v. Braithwaite, 1 Vern. 334. Long v. Clopton 1 Vern. 464.

(r) So if a trustee or executor obtain the renewal of a trust term, such renewal shall be for the benefit of the cestuique trust. Holt v. Holt, 1 Ch. Ca. 191. will the circumstance of the lessor having refused to renew to the cestuique trust, he being an infant, differ the case. Keech v. Sandford, Sel. Ca. Ch. 61. principle of the decisions being, that a trustee shall not be allowed to raise in himself an interest opposite to that of his cestuique trust; upon which ground it has also been held, that a trustee or particular agent shall not be allowed to become the purchaser of that which he holds in trust; Whelpdale v. Cookson, 1 Vez. q.; Morrett v. Paske, 2 Atk. 54; Whichcote v. Lawrence, 3 Vez. 740; Maffey v. Davis, 2 Vez. Jun. 317; unless the title afterwards appear to be in a third person; Lefley's case, 2 Freem. 52; but see Odlin v. Samborne, 2 Atk. 15.

brance

(3) Philips v. Vaughan, 1 Vern. 336. Morrett v.Palke 2 Atk. 54.

brance to which he was entitled, or there be some special circumstances in the case. But if one acts for himfelf, and being not in the circumstances of a trustee or executor, buy in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due upon the mortgage; for he stands in the place of him that affigned (3), viz. the mortgagee, who might have given it to him gratis; and what is due must be the measure of our allowance, and not what he gave, for that might have been more than it is worth, as well as less; and fince he runs the hazard, if a loss happens, he ought to have the benefit, in case it turns to advantage. Yet the true reason seems to be this, that in the first case, he that takes upon him a trust, takes it for the benefit of the person for whom he is trusted, and not to take any advantage to himself. But in the latter, as far as he did not purchase, it was a free gift, and one man shall not profit himself of the contract of another. But where there are subsequent incumbrances or creditors in the cafe, there a man that buys in a prior incumbrance, shall be allowed only what he really paid

part (s), though there was in truth a greater fum due (5); for nemo ex alterius detrimento fieri debet locupletior, and therefore the taking away one man's accidental gain to make up another's loss, is making them both equal. But the owner or his representatives are no losers, when they pay the whole money due.

(5) Francis's M xims, Max. 3. p. 9.

(s) The authority of the case, Williams v. Springfield, where this distinction was taken, was very much shaken by Lord Hardwicke's judgment in Merrott v. Paske, 2 Atk. 54; and see Price v. De Burgh, 13 Nov. 1791. 3 Dec. 1792, Rolls. 3 Ch. Rep. 23. 1 Vern. 335, 336. 49. 1 Salk. 155. Crowe v. Ballard, 3 Bro. Ch. Rep. 120.

enald not have been executed.

CHAP. VIII.

- weigh a flow arraw special flowers

Of the Execution of the Trust.

SECTION I.

be executed. And there may be many reasons why a court of equity would not decree a conveyance at all, (viz. of the legal estate by the trustees,) sometimes for a politic reason: as if it were to enable a nobleman to suffer a recovery, and leave the honour bare without estate(1), or if the party were a notorious spendthrist, or when the estate-tail was only by implication. And so before the act, tortious and troublesome uses could not have been executed; for this court, which has the jurisdiction of trusts, will see that they do no mischief.

(1) Sanders v. Neville, 1 Eq. Ca. Ab. 392, 393.

SECTION II.

It is agreed on all hands to be a declared rule in this court, that if money be devised to be laid out in the purchase of lands to be settled on one and his heirs, the person himself for whose benefit the purchase was to be made may come into this court, and pray to have the money itself, and that no purchase may be made, because none have an interest in it but himself. But if he dies before the purchase made, or payment of the money (a), so that the question

(a) The circumstance of the money not being paid over to a cestuique trust absolutely entitled to it, assords an inference, that the cestuique trust intended it to continue liable to the real use; and upon that ground Lord Thurlow, Chancellor, proceeded in Rashleigh v. Masters, I Vez. Jun. 201. 3 Bro. Ch. Rep. 99. But it may be material to remark, that this decision is not reconcilable with the case of Curling v. May, cited in Guidott v. Guidott, 3 Atk. 255. And though, from the cestuique trust not uniting the possession with the use, such an inference of intent could be raised, as between the heir and executor; yet as a mere inference it may be repelled by any circumstance affording evidence of a contrary intention, and therefore the fund would

tion comes between his heir and executors which of them shall have the money, the heir shall be preferred; and it shall for his benefit be considered in a court of equity, as if the purchase had been actually made in the life-time of his ancestor

would pass by particular description, as so much money to be laid out in land. Cross v. Addenbroke, and Fulham v. Jones, cited in Lechmere v. Earl of Carlifle, in 3 P. Wms. 224; or by a bequest of all the teltator's estate in law and equity, or of all his estates whatsoever or wherespever. Rashleigh v. Masters, 1 Vez. Jun. 204. Provided he was adult, for otherwise he is not competent to elect that it shall be the one or the other, Earlom v. Sanders, Ambl. 242. Car v. Ellison, 2 Bro. Ch. Rep. 56. With respect to the cases in which a trust shall result to the heir, the particular purpose for which the land was directed to be converted into money, having failed, fee Cruse v. Barley, 3 P. Wms. 20, and Mr. Cox's note (1), where the cases are collected and referred to their respective principles. That the court will not direct money to be laid out in freehold estate, which the trustees were empowered to lay out in freehold or leasehold, and which, if laid out in freehold, would have escheated to the crown pro defectu tenentis, see Walker v. Denne, 2 Vez. Jun. 170. That equity will not change the quality which the property had at the death of the testator, as between the real and personal representatives, see Chitty v. Parker, 2 Vez. Jun. 271; Wentworth v. Young, Vin. Ab. Executors, Ch. pl. 32. 2Vern. 284. Swann v. Fonnereau, 3 Vez. Jun. 41.

for two reasons: 1st, Because the heir is to be favoured in all cases, rather than the executors, who by the old law were to have nothing to their own use; 2dly, If the executors should have it, it would be against the words of the will, which gave it to the heirs (1). So if trustees in a will have power to fell the whole estate for payment of his debts, and that the refidue should go to A. and B. his wife, as they by any deed, &c. should appoint. A dies, and B. devises it to C. It must be considered in equity as if actually fold, and go accordingly; in which case the money would have gone to the husband, and fo must the land too, else it would be in the power of truffees to make it land or money, and fo to give it to whom they should think fit (2).

(1) Scudamore v. S. udamore, Pre. Ch. 544. Chaplin v. Horner, fee alfo 1 P.W. 486. 1 vol. 413. 415. where this point is very fully confidered.

(2). (2)Collingwood v. Wallis, 1 Eq. Ca. Ab. 396. Davers v. Folkes, 1 Eq. Ca. Ab. 396.

SECTION III.

e

BUT it is now constantly held in Chancery, that if the lands are vested in trustees, to the use of one and the heirs of Vol. II. O his

his body, with remainder over, that the trustees are not to convey a fee but an estate tail, though he will have power to bar the entail when the conveyance is made to him, and it would avoid circuity. So if a fum of money be appointed to be laid out in a purchase, and the lands to be fettled in tail, the purchase and fettlement fhall be made accordingly, and not the money paid the party (b); for the remainder-man has a chance for the estate, in case the tenant in tail in possession die without iffue before any recovery fuffered, which he may omit through ignorance or forgetfulness, or he may be prevented by death, before he has completed it.

(b) Having already had occasion to consider the cases and distinctions upon this point, see B. I. c. 6. s. 10. I shall content myself with merely stating, that our author's rule applies only to those cases, where a recovery would be necessary to render the cessuique trust absolute owner of the see; or to those cases where the cessuique trust, being an infant, could not levy a fine: for if the cessuique trust in tail could by sine acquire an absolute estate in the land, the court will decree him the fund absolutely.

SECTION IV.

AND in the performance of a trust, the Chancery has a power to alter the disposition of the party upon emergent accidents, which he did not foresee (c); and which if he had foreseen, he would in all probability have settled his estate otherwise. As where cestuique use willed, that his feossees should convey to his daughters, and died, and after his death a son is born, the seossees shall convey to him; because the cestuique use never intended to disinherit his heir

(c) The case referred to is certainly an authority in support of our author's proposition, that in the performance of a trust, courts of equity will, upon certain events, alter the disposition of the party: And though the case gives a latitude of construction much beyond what our courts of equity would probably now consider themselves entitled to take, yet it does appear to have been referred to by Lord Nottingham, in Hyde v. Seymour, 2 Freem. 42., and to have received from his Lordship at least an indirect fanction of its principle. It was also referred to in Hills v. Brewer, 2 Vern. 104. sed non allocatur; see also Winkfield v. Combe, 2 Ch. Ca. 16, which refers to a case as strong in principle.

(1) Nourfe v. Yarworth, Rep. Temp. Frach, 159. Hyde v. Seymour, 2 Freem. 40.

at law (1). Nor is this court bound to decree according to the ordinary rules of law, in construction of wills, where the question in a devise arises upon the performance of a truft; as where A., having two daughters and never a fon, makes feoffment to the use of his will, and devises his land to J. S. upon trust and confidence inter alia, for the raifing the fums of money following, viz. if he has but one daughter, then 12,000/. to her fortune, if two or more 20,000/. amongst them, equally to be divided, the same to be due and payable at their feveral ages of twenty-one years or marriage, which shall first happen, with a provision for maintenance in the mean time, A. left three daughters, and one died under age, &c.; here being an apparent intention, that these two daughters should have 10,000%. a-piece, this court will comply with it, notwithstanding any accident that might happen to the contrary.

SECTION V.

So where an executrix has a general power or trust to distribute a sum of money amongst children at discretion; an unreasonable and indiscreet disposition may be controlled in a court of equity. But otherwise where the power is special and particular; as that the wise might dispose to one or more; for this is casus provisus, and it is expressly provided, she might give all to one (1). Yet it is now held discretionary in the court to relieve or not (d), since such clauses are for the most

(1) Thomas v. Thomas, 2 Vern. 513.

(d) It is observable, that, in the case of Wall v. Thurbane, I Vern. 414. the mother to whom the power was given by the will of the father, had married a second husband, whose influence might have materially weighed in the unequal distribution which she made, and to that consideration, the interposition of the court is in some degree to be referred. For it were clearly too much to maintain, that a court of equity has a right of controlling the execution of a discretionary power of distribution among a definite description of persons, merely in respect of its being unequal, see Burrell v. Burrell, Ambl. 660: if it be grossly unreasonable, or induced by any irregular motive, then indeed the interference of a court of equity falls within the rule laid down in Thomas v. Thomas, 2Vern. 513.

(2) Gibson v. Kinven, 1 Vern. 66. Wall v. Thuibane, 1Vern. 414.

(3) Warburton v. Warburton, 2Vern. 421.

(4) Wareham v Brown, 2Vern. 153.

(5) See B. 2. c. 5. note.

most part to preserve obedience only (2). So the power given by will to dispose of a personal estate by an executrix being general, to distribute to the use of herself, her brothers and fifters, according to their need and necessity, as in her discretion fhe should think fit; the heir shall have a double share, being most in need of it (3). And if one devise to two of his fifters 400l. a-piece, and to his third fifter what his executors should think fit; the third fister shall have 4001. also, and be made equal to her two other fifters, if the estate will hold out (4). So where the testator defires his executor to give 100/. to A. if he thought fit; this feems to be a trust in his hands (5).

See Civil v. Rich, 1 Ch. Ca. 309. Clarke v. Turner, 2 Freem. 198. Menzey v. Walker, Forrest. 72. Maddison v. Andrews, 1 Vez. 59. Alexander v. Alexander, 2 Vez. 640. Pocklington v. Bayne, 1 Bro. Ch. Rep. 450. Boyle v. Bishop of Peterborough, IVez. Jun. Spring v. Bills, in a note, I Term Rep. 435, which recognize this distinction. As to what shall be confidered as an excess in the execution of a power of appointment, see Bristow v. Ward, 2 Vez. Jun. 336., where the cases upon the point are fully considered.

SECTION VI.

AS for the general rule, that portions may be raifed by the fale of reverfionary terms in the life of the tenant for life, it cannot be got over; though on the other fide there are cases where it has been refused. But this must depend upon the circumstances of the deed, and the intent of the parties (1). And 1st, If a portion is directed to be paid at eighteen, or day of marriage, and the term is abfolutely vested; there the daughter shall not expect during the life of the father; but it may be fold in the father's lifetime, although a term in remainder and not in possession (e). 2dly, If the trust of the

(1) Corbett v. Maydwell, 1 Salk. 159. 1 Eq. Ca. A5. 337. 2 Vern. 656

(e) Although the cases referred to, Graves v. Maddison, Corbett v. Maydwell, Gerrard v. Gerrard, and Stanisorth v. Stanisorth, have never been directly overruled; yet in subsequent cases they have been considered as determinations in their principle, so replete with inconvenience, that they ought to govern only cases precisely similar in all their circumstances. See Sandys v. Sandys, 1 P. Wms. 707. Hebblethwaite v. Cartwright, Forrest. 31. Hall v. Carter, 2 Atk. 354. Lyon v. Duke of Chandos, 3 Atk. 416. Smith v. Evans, Ambl. 633. Conway v. Conway, 3 Bro. Ch. Rep.

the term had been upon a condition precedent, as to commence if the father die without iffue male by his wife, in trust to raise portions for daughters; there if the wife be dead without iffue male, leaving a daughter, though the father is living, the term has been decreed to be fold. For in equity, the father is taken to be dead without iffue, when the wife is dead, by whom he was to have iffue; all that is contingent there has happened by the death of the wife without iffue male: and the hufband must also one time or other die, as all men must, and whenever he dies, he must die without iffue male by that marriage, his wife being dead before. So that this is in truth a remainder, and depends no longer

Rep. 267. In those cases, therefore, which can be distinguished from them, the court will not decree the portion to be raised in the life-time of the father or mother, as where all the contingencies have not happened; Butler v. Duncomb, I P. Wms. 448; Reresby v. Newland, 2 P. Wms. 93; or where maintenance is provided out of the rents and profits after the term limited to raise the portion, should take effect in possession. Brome v. Berkeley, 2 P. Wms. 484. Stevens v. Dethwick, 3 Atk. 39. Goodal v. Rivers, Mosely, 395. Churchman v. Harvey, Ambl. 335. At to the manner in which portions shall be raised, see B. I. c. 6. f. 18.

upon a contingency; and this court, as in fome cases they do prolong the time, so here they have shortened it (2). And thus far the court has gone for convenience, that young women may have their portions, when they most want them; or else the father might live fo long, that the portion might be of little fervice. 3dly, But if the agreement is, that the portion should be paid after his death, it is hard to make it payable in his life-time. it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them, and the cases on this head have gone too far already, and mangled all estates, and therefore they will never decree portions to be raifed in the father's life-time, where it can possibly bear any other construction (3).

(2) Graves v. M ddifon, SirT Jones, 201 Gerrard, 2V rn. 458. Staniforth v. Staniforth, 2Vern. 460.

r conttruction (3).

1 P.W. S. 448, 2 Vern. 762. Reresby v. Newland, 2 P.W. 33.

SECTION VII.

A ND there is no difference where the portion is secured by a settlement, or will, if secured out of a real estate (f), and the

(f) Nor is there any difference whether the land be the primary, or merely an auxiliary fund. Yates v. Fettiplace, 2 Vern. 416. Jennings v. Looks, 2 P. Wms. 276. Prouse v. Abingdon, 1 Atk. 482. Van v. Clark, 1 Atk. 510. Richardson v. Greefe, 3 Atk. 69. Sherman v. Collins, 3 Atk. 319. Harrison v. Naylor, 3 Bro. Ch. Rep. 108.; nor whether the provision be for a child or a stranger, Attorney General v. Milner, 3 Atk. 113. Gawler v. Standiwick, 1 Bro. Ch. Rep. in a note, 106; nor, as was once supposed, (see Cave v. Cave, 2 Vern. 508,) whether it be given with or without interest; Cave v. Cave, 2 Vern. 508. Rich v. Wilson, Mosely, 68. Bradley v. Powell, Forrest. 193. Baycott v. Cotton, 1 Atk. 555. Gawler v. Standiwicke, I Bro. Ch. Rep. in a note, 106.; nor whether the finking of the portion be for the benefit of the heir, or of a devisee, Jennings v. Looks, 2 P. Wms. 276. provided it be charged on real effate, and not payable until a future day. But if a future day of payment be not appointed, or a merely general difcretion be given to raise the portion within a certain time; it appears to have been held in some cases, that the charge is immediately upon the death of the testator, a vested and transmissible interest; see E. of Rivers v. E. of Derby, 2 Vern. 72., and recognized in Smith v. Smith, 2 Vern. 92. Cowper

the party dies before it is payable; in either case it sinks in the lands (1). But the

(1) Pawlett ve Pawlett, 1 Vern. 204. 321.

eVern. 366. Smith v. Smith, 2Vern. 92. D. of Chandos v. Talbot, 2 P.Wms. 610. Gozdon v. Raynes, 3 P. Wms. 138.

Cowper v. Scott, 3 P. Wms. 119. Wison v. Spencer, 3 P. Wms. 172. Tunstall v. Brachen, Ambl. Hodgson v. Rawson, 1 Vez. 44. Hutchins v. Foy, Com. Rep. 716. Emes v. Hancock, 2 Atk. Manning v. Herbert, Ambl. 575. Martin, Ambl. 230. Jeal v. Hitchener, 4th July 1771. Clarke v. Ross, 22 Nov. 1773. Kemp v. Davy, 1774; which cases are stated in a note, I Bro. Ch. Rep. 120. Thompson v. Dow, 1763. Morgan v. Gardner, M. 1777. Godwin v. Munday, I Bro. Ch. Rep. 191.; but see Norfolk v. Gifford, 2 Vern. 208. Brewin v. Brewin, Pre. Ch. 195. Tournay v. Tournay, Pre. Ch. 290.; in which cases such legacies were held not to be transmissible: see also Warr v. Warr, Pre. C. 213. in which case a portion to be raised for a child was not held transmissible, the child having died before it was raifed, the trustees having a discretion to raise it when they thought fit. The apparent contrariety of decifion upon this point must be referred to the nature of the subject. Courts of equity, looking for the intent of the parties, are naturally influenced by a variety of prudential confiderations, which cannot be brought within the range of any general rule; where the time of payment is prescribed with reference to the person, the rule of the civil law, causa data non secuta, may be reasonably applied; but where the time of payment is postponed, from the circumstances, not of the person, but of the fund, that rule cannot be applied without putting the general

difference is between a personal legacy (g), which in such case being debitum in præfenti though folvendum in futuro, and governed merely by the ecclesiastical law
which is so, shall go to the executor or
administrator, and a sum of money appointed to be raised out of the rents and
profits of lands, and designed for a particular purpose; as a portion for a daughter,
payable expressly at twenty-one, or marriage, for which there was no occasion, she
dying under age and unmarried.

intent of the testator into hazard. Emperor v. Rolfe, 1 Vez. 208. To afcertain the real motive may be difficult; but whenever it can be ascertained that the time of payment was not made immediate, because it might overcharge the estate, it should feem to be too much to contend, that the heir at law, or devisee, should have the further advantage of the possibility of the legatee dying before the time of payment. See Lowther v. Condor, 2 Atk. 130. Sherman v. Collins, 3 Atk. 319. King v. Withers, Forrest. 117. Smith v. Partridge, Ambl. 266. Dawfon v. Killett, 1 Bro. Ch. Rep. 119. It is also an exception to the general rule, if the portion be made payable on one of two or more contingencies, and one of the contingencies happen in the life-time of the legatee, as where payable at 21, or marriage. King v. Withers, Forrest. 117.

(g) This distinction is established by a great number of cases, which are brought together by Mr. Cox, in his note (1), to the case of the Duke of Chandos v. Talbot, 2 P. Wms. 612.; as to what words or circumstances will vest a legacy, see B. 4. c. 2. s. 4.

PART II.

Of Public Trusts.

CHAP. I.

Of Charities.

SECTION I.

THE preservation of every private man's goods in particular, is the preservation of the commonwealth in general. And therefore in every good government, the magistrates ought to have a special care and regard of the estates of orphans, madmen, and prodigals. So, anciently in this realm, there were several things that belonged to the king as pater patrix (1), and sell under the care and direction of this court; as charities (a), infants,

(1) Lord Falkland v. Bertie, 2 Vern. 342.

⁽a) Sir W. Blackstone observes, that "the king, as parens patriæ, has the general superintendance of all charities, which he now exercises by the keeper of his conscience,

fants, idiots, lunaticks, &c. afterwards, fuch of them as were of profit and advantage

conscience, the Chancellor. And, therefore, whenever it is necessary, the attorney general, at the relation of some informant, who is usually called the relator, files ex officio an information in the Court of Chancery, to have the charity properly established." 3 Com. 427. This proposition is too general; for, though it be true, that where a charity is established, and there is no charter to regulate it, as there must be fomewhere a power to regulate, the king has, in fuch case, a general jurisdiction; yet, if there be a charter with proper powers, the charity must be regulated in the manner prescribed by the charter, and there is no ground for the controlling interpolition of the Court of Chancery. Attorney-General v. Middleton, 2 Vez. 328. The interposition of the court, therefore, in those instances in which the charities were founded on charters, or by act of parliament, and a vifitor, or governor or trustees appointed, must be referred to the general jurisdiction of the court, in all cases in which a trust conferred appears to have been abused, and not to an original right to direct the management of the charity, or the conduct of the governors or A distinction, manifested by those cases, in which the court has refused to interpose its opinion against that of the governors of a charity, having a right by the terms of its foundation to exercise their discretion in certain particulars. See Attorney-General v. Foundling Hospital, 4 Bro. Ch. Rep. 165. 2 Vez. Jun. 42. Attorney General v. Middleton, 2 Vez. 327. But fee Gower v. Mainwaring, 2 Vez. 89. respect to the right of visitation, see Highmore on Charitable

tage to the king, were removed to the court of wards, but by the statute, upon the dissolution of that court, came back again to the Chancery. And although it was formerly doubted (2), if the court could by bill take notice of the statute of 43 Eliz. c. 4. for charitable uses, so as to grant a relief according to that statute upon a bill, but that the course prescribed by that statute, by a commission of charitable uses, must be observed in cases relievable by that statute (b); yet now it is agreed, that the Chancery may relieve upon

(2) Attorney-General v. Palmer, 1 Ch. Ca. 157.

ritable Uses, in which work this point is very fully confidered.

(b) As to what shall be deemed a charitable use, the stat. 43 Eliz. c. 4. enacts, that the commissioners shall inquire of the following uses as good and charitable: viz. For relief of aged and impotent and poor people; for maintenance of sick and maimed soldiers, schools of learning, free schools, scholars in universities, houses of correction; for repairs of bridges, of ports and havens, of causeways, of churches, of sea banks, of highways; for education and preferment of orphans, for marriage of poor maids, for support and help of young tradesmen, of handicrasts-men, of persons decayed; for redemption, or relief of prisoners or captives, for ease and aid of poor inhabitants; concerning payment of sisteenths, setting out of soldiers,

and

(3) West v. Knight, 1 Ch. Ca. 134. Anon. 1 Ch. Ca. 267.

(4) Attorney-General v. Hewer, 2Vern. 287. upon an original bill in these cases (3). But a school for the inhabitants of A. not being a free school, is not a charity within the stat. of Eliz. (4) and consequently the inhabitants have not a right to sue in the attorney-general's name.

and other taxes; other gifts, provisions, and limitations, which, though not within the letter, have been held to be within the purview of the statute, as money to maintain a preaching minister, to maintain a schoolmaster (but query, if the latter cases are not immediately within 1 Ed. 6. c. 14.) So for the building of an hospital for the relief of poor people. See Vaughan v. Farrer, 2Vez. 187. So for the king to found a free school, and make it a corporation of guardians, masters, and ushers, to give charity to them and theirs for necessaries to maintain them, and certain poor people under them. So for the building a feffions-house for a city or county, the making of a new or repair of an old pulpit in a church, or the buying of a pulpit-cloth or pulpit-cushion, or the setting up of new bells where none are, or amending them where they are out of order. Duke's Charitable Uses, 109. So a devise of money to a minister to preach an annual fermon, and keep a tombstone and inscription in repair, and to a corporation for keeping accounts thereof, is a charitable use, and, if charged on land by will, is within 9 G. 2. c. 36. Durour v. Motteux, I Vez. 320. See also Grieves v. Case, 4 Bro. Ch. Rep. 67.

SECTION II.

AND tenant in tail may dispose of a charity out of his land, without fine or recovery, and even by will, by virtue of the construction which has been made on the 43 Eliz. the statute of charitable uses supplying all defects of assurance (c), either in the giver or receiver, where the donor is of capacity to dispose, and hath such an estate as is any way disposable by him, whether by fine or recovery; for the intent of the statute of charitable uses was to make the disposition of the party as free and easy as his mind, and not to

(c) Though it be true that, where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses, yet such uses or trusts must be declared in writing, or be established by such evidence as is necessary in other cases of trust. Adlington v. Cann. Barnard. 130. Highmore's Charitable Uses, 67. 1st ed. Attorney-General v. Spillet, Highmore, 68. It may also be material to remark, that the capacity of the party to convey making a term in the general proposition, infants, lunatics, or semes covertes are not within it. Duke's Charitable Uses, 110. Jesus College Case, Duke, 78. Collison's Case, Hob. 136.

Vol. II.

by

(1) Tay v. Slaughter, Pre. Ch. 16. Attorney General v. Rye. 2Vern. 453. Attorney General v. Burdett, 2Vern. 755. Case of Christ College, Cambridge, 1 Bla. Rep. 90. (2) Attorney General v. Baynes, Pre. Ch. 270. 2 Vern. 597. Jenner v. Harper, Pre. Ch. 389. (3) Herne's Charit. Uses, ch. 6. ca. 14, 15, 16. Attorney General v. Baynes, 2 Vern 598. Attorney General v. Andrews, 1 Vez. 235. See 1 vol. b. 1. c. 1. f. 7. 1 Lev. 284.

oblige him to the observance of any form or ceremony (1). But if a man dispose of a charity by will, and fuch will wants the necessary circumstances required by the statute of frauds and perjuries, it shall not operate as an appointment (2); for the statute of 43 Eliz. is now repealed pro tanto, and though there were three fubfcribing witnesses to the codicil, yet that would not support the will. But as to fuch of the lands as were copyhold, it was agreed, they were well appointed, they passing by surrender, and not by the will (3). So a devise in mortmain is good (d) as an appointment to a charity within the 43 Eliz (4). But fee now the late statute 9 Geo. 2. c. 36 (e).

(d) A devise in mortmain is not within the statute of wills; and therefore a devise to a charity was allowed to take effect, as an appointment in order to effectuate the intent of the party, who in his lifetime might have conveyed it to fuch charitable use. See 34 and 35 H. 8. c. 5. f. 4, 5. As to the history and progress of laws,

(4) Flood's Cafe, Hob. 136. The King v. Newman,

prohibitory and restrictive of conveyances in mortmain, fee 2 Bla. Com. 268. and Highmore's Charitable Uses.

(e) The legislature, finding that the political ends of the statutes of mortmain were frequently defeated,

by the large and improvident dispositions made by perfons on their death-beds, even for purpofes in themselves laudable, by the statute of 9 G. 2. c. 36. enacted, That no manors, lands, or tenements, rents, advowfons, or other hereditaments, corporeal or incorporeal, whatfoever, nor any fum or fums of money, goods, chattels, stocks in the public funds, fecurities for money, or any other personal estates whatsoever, to be laid out in the purchase of lands, &c. shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or anywife conveyed or fettled to or upon any person or persons, bodies politic or corporate, or otherwife, for any estate or interest whatsoever, in trust, or for the benefit of any charitable uses whatfoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor or grantor, including the days of the execution and the death, and inrolled in the Court of Chancery, within fix months after its execution; and unless such stocks be transferred in the public books, usually kept for the transfer of stocks, fix calendar months before the death of fuch donor or grantor, including the days of the transfer and death, and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reversion, trust, condition, limitation, clause, or agreement whatfoever, for the benefit of the donor or grantor, or of any person or persons claiming under him; provided always, that fuch limitations, &c. shall not be construed to extend to any purchase or transfer made for valuable confideration; the flatute then declares all other gifts, grants, conveyances, transfers, &c. to be null and void, with a proviso that it shall not be construed to extend to the two univerfities, their colleges, and the scholars upon the foundation of the colleges of Eton, P 2 Winchester.

Winchester, or Westminster; such exceptions are however, subject to the proviso, that no college shall, from June 1736, be at liberty to purchase, acquire, receive, take or hold more advowfons than are equal in number to one moiety of the fellows or students upon the respective foundations: and the act further provides, That nothing therein contained shall be conflrued to extend to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland." It is not a little extraordinary, that an act, fo diffinctly prefenting its principle and purpose, should have given rife to fo great a number and variety of cases, as this act appears to have done. Mr. Highmore has brought them together, and has stated them so fully, that I shall content myself with stating the general result of them.

1st, It has been held, that the restrictions of this act do not apply to wills made before the passing of it, though the testator did not die till afterwards. Ashburnham v. Bradshaw, 2 Atk. 36. Barnard. 6. Attorney General v. Lloyd, I Vez. 33. Willet v. Sandford, I Vez. 178. Attorney General v. Hawes, Feb. 1793. But see Attorney General v. Heartwell, Ambl. 451. Attorney General v. Downing, Ambl. 550.

2dly, As manors, lands, rents, &c. are directly within the statutes, and, as a devise of money to arise by sale or otherwise out of land, is construed a devise of the land itself, Attorney General v. Lord Weymouth, Ambl. 20., devises, charges, trusts, sums of money, &c. devised out of land to a charitable use, are void. Dalton v. James, cited in Mogg v. Hodges, 2 Vez. 52., and Arnold v. Chapman, I Vez. 108. That the words of the act are construed to extend to terms, see Attorney General v. Graves, Ambl. 155.

Attorney

Attorney General v. Tomkins, Ambl. 216. That it extends to mortgages, fee Attorney General v. Meyrick, 2 Vez. 44. Attorney General v. Graves, Ambl. 155. Attorney General v. Caldwell, Ambl. 635. White v. Evans, 4 Bro. Ch. R. 21.

3dly, A bequest of money, goods, chattels, stocks, fecurities for money, or any other personal estate, to be laid out in the purchase of lands, &c. to a charitable use, is, by the flatute, expressly declared to be void; but, as the bequest of money generally would be good, so a bequest of money, &c. to be laid out in lands or otherwife to a charitable use, has been supported. Soresby v. Hollins, 6th August 1740, and Gragfon v. Atkinfon, 7th November 1752, cited in Ambl. 211, 212. See also Grimmett v. Grimmett, Ambl. 210., which recognizes the principle upon which the two above cases were decided, and gives it an additional extent, by holding, that though the truftees have not an express power given them to invest in the funds, or otherwise; yet, if they are not expressly directed to invest the money in lands, but have a difcretion to leave it invested in the funds until they can to their fatisfaction invest it in lands, the court will confider fuch power to be merely nugatory; for, whilft the act of G. 2. is in force, they cannot invest in lands, without a breach But see English v. Ord, 9th July 1754, of trust. flated in Highmore, 82., and Grieves v. Cafe, I Vez. Jun. 548., in which it was held, that if the elaufe was directory, and not difcretionary, though the difcretion, if purfued in fuch extent, would be against law, that made the devise void. But a gift by will of money to be laid out in repairing a chapel already built, or to erect on land already in mortmain, is not within the statute. Glubb v. Attorney General, Ambl. 373. Harris v. Barnes, Ambl. 651. Brodie v. Duke of Chandos,

Chandos, cited in Ambl. 751. Attorney General v. Bowles, 2 Vez. 547. 3 Atk. 806. Attorney General v. Bp. of Chester, I Bro. Ch. Rep. 444., and Cases stated in Appendix, p. 20. Gastril v. Baker, cited in Vez. 185. Attorney General v. Nash, 3 Bro. Ch. Rep. 588. But if the land is to be purchased out of the fund bequeathed, the bequest is void. Attorney General v. Tindall, Ambl. 614. That a bequest of real and personal estate to a trustee, to take a house for a school to educate children and grandchildren of particular persons, and other children, is good as to the particular objects, but bad as a general charity, fee Blandford v. Fackerell, 4 Bro. C. R. 394. 2 Vez. Jun. 238.

4th, Though a direct devise of land to a charitable use, or of money charged on land, is void; yet a bequest of money, charged on both the real and personal estate, though void as to the real, is good as to perfonal estate; and the court, though it will not marshal affets for the fake of a charity, Arnold v. Chapman, I Vez. 108. Mogg v. Hodges, 2Vez. 52. Walter v. Child, 2 Ambl. 524.; yet it would formerly, to support the bequest, arrange the different species of personal estate. Attorney General v. Caldwell, Ambl. 635. Campbell v. E. of Radnor, 1 Bro. Ch. R. 271. But this rule is now otherwise; see Attorney General v. Winchelsea, 3 Bro. Ch. R. 373. Makeham v. Hooper, 4 Bro. Ch. Rep. 156.

SECTION III.

BUT whenever any thing is given to charity, and no charity appointed (1), or if the charity which is appointed, be superstitious (b), there (i) the king shall appoint.

(1) Attorney
General v. Siderfin, 1 Vern.
224.
Anon, 2 Freen.
261
White v White,
1 Bro. Ch.

Rep. 15. Attorney General v. Herrich, Ambl. 712. and cases there cited.

- (b) As to what may be confidered a superstitious use, see Duke's Charitable Uses, 105. Ambl. 107, 108. Adams and Lambert's case, 4 Rep. 104.
- (i) By I Ed. 6. c. 14. gifts to certain superstitious uses therein enumerated, are declared to vest in the crown; but see Adams v. Lambert's case, 4 Rep. 104., other gifts, though void as to the superstitious use, shall neither vest in the crown, nor in the heir, but shall be appointed to fuch uses as the king shall order. Rex v. Lady Portington, 1 Salk. 162. But fee Porter's cafe, 1 Rep 26. a. With respect to gifts to charitable uses, where no specific description of object be pointed out, the Court of Chancery will, in respect of the general purpose appearing, direct the mode of giving it effect. Attorney General v. Herrick, Ambl. 712; and this is agreeable to the rule of the civil law, which is fo peculiarly favourable to charities, that legacies to pious or public uses shall not fail from the want of certainty as to the particular object intended. See Domat. 2 V. p. 161, 162. If not only the general purpose appear, but also a particular description of persons or objects be referred to, though as between such persons or objects the party has made no felection, yet the court will confine its discretion in supplying such omission within

appoint. And although a devise cannot

be averred to be a superstitious use, by reason of the statute of frauds, yet the king is not bound by that statute (2). (2) Rer v. Lady Portington, So of an uncertain (3) as well as void use; 1 Salk. 162. (3) Jones v. Peacock, Rep. for the use is void, and not the charity, Temp. Finch, yet in the case of a superstitious use, the 245. Atterney Geneappointment shall be to a charitable use, ralv. Hickman, 2 Eq. Ab. 193, ejusdem generis (4); for the appointment D yley v. Atof that good use to which it shall be aptorney General, 4 Via. Ab. 485. pl. 16 Widmore v. Woodroffe, Ambl. 639. White v. White, 1Bro. Ch. Rep. 12. Mog-(4) Attorney General v. Baxter, 1 Vern. geridge v. Thackwell, 3 Bro. Ch. Rep. 517. 248. Attorney General v. Guife, 2 Vern. 266.

> within the limits of fuch general description. White v. White, I Bro. Ch. Rep. 12. Moggeridge v. Thackwell, 3 Bro. C. Rep. 517. Attorney General v. Clarke, Ambl. 422. Waller v. Childs, Ambl. 524. If the object of the gift be certain, but not at present in existence, yet if its existence may be expected hereafter, the court will neither confider the gift lapfed, nor apply it to a different use. Aylett v. Dodd, 2 Atk. 238. Downing College case, Ambl. 550, 571. Attorney General v. Oglander, 3 Bro. Ch. Rep. 166. But if the charity or object of the gift be precisely pointed out, and fail, it feems then in general it shall not be applied to any other. Attorney General v. Bp. of Oxford, 1 Bro. C. R. 379. Attorney General v. Goulding, 2 Bro. Rep. 429. But fee also Attorney General v. City of London, 3 Bro. C. R. 171.

plied, is a judicial act, and ought to be according to the rules of the court. And although the charity cannot take place according to the letter, yet it ought to be performed cy pres, and the substance pursued. But where the appointment is good, it shall not be in the power of the heir by his consent to alter the disposition of his ancestor; for they shall be held to the letter of the charity (5). Much less of the devisee as the parishioners (6).

(5) Attorney
General v.
Plott, Rep.
Temp: Finch,
rofeffor, 1Vern.

222. Attorney General on behalf of Peter House, Cambridge, v. Regius Professor, 1Vern. 55. Attorney General v. Christ's Hospital, 3 Bro. Ch. Rep. 165. (6) Man v. Bailet, 1Vern. 42., but see Attorney General v. Hart, Pre. Ch. 225.

SECTION IV.

AND where, in the constitutions for founding an hospital, it was ordained, that no lease should be made for above twenty-one years, and the rent not to be raised, nor above three years rent taken for a fine, though the tenant of the hospital lands is entitled to a beneficial lease upon renewal, the constitution being just

(1) Watfon v. Hiofworth Hospital, 2Vern. 596.

and charitable, for the encouragement of the tenant; yet this constitution is not to be followed according to the letter, but in the reason of it (k), as fines alter, and the price of provisions increase, so the rent ought to be raifed in proportion (1). So if the hospital makes a lease for twentyone years, with a covenant by renewal to make it up fixty years, and by deed of covenants the leffee covenants to pay all additional rents: this covenant is not binding in equity, as being equally prejudicial to the hospital, as a lease for fixty years. And the corporation are but truftees for the charity, and might improve for the benefit of the charity, but could not do any thing to the prejudice of the charity in breach of the founder's rules (1). the

⁽k) By the statute 13 Eliz. c. 10. corporations are restrained from granting long leases, &c. of their lands, as such leases would be as mischievous as the alienations of their possessions; and as a perpetual renewal upon particular terms would be equivalent to an alienation, the court will not enforce such a covenant. Somerville v. Chapman, I Bro. Ch. Rep. 61.

⁽¹⁾ If therefore the contract of the corporation exceed its powers, and injury result to the party with whom they contracted, his remedy must be against the individuals

the additional rent and arrears shall be paid during the term of twenty-one years; for though it was an indenture of mutual covenants on the lessor's part to renew, and on the lesser's part to pay the additional rent, those covenants appeared in the deed to have been made on distinct considerations, viz. the covenant for increase of rent, because the price of provisions was raised, and the covenants for renewal, because the lessee undertook to lay out 100%. in buildings (2).

(2) Lydiat v. Foach, 2Vern.

individuals figning the contract, and not against the corporation. Taylor v. Dulwich College, 1 P. Wms. 655.

SECTION V.

AND if A. feized of a manor, of the yearly value of 2401. devises several legacies, and particularly to his heir at law 40s. and then adds; that being determined

mined to fettle for the future, after the death of me and my wife, the manor of F. with all lands, woods and appurtenances to charitable uses, I devise to M. N. &c. upon truft, that they shall pay yearly, and for ever, feveral particular fums to charitable uses, amounting in the whole to 1201. per annum, and gives the trustees fomething for their pains; there being an overplus, it shall go in augmentation of the charities (1) it appearing to be the testator's intent to settle the whole manor, and that the heir should have no more than the 40s. (m) So where the rever-

(1) Arnold v. Attorney General, Show. P.C. 22. The case of Thetford fchool, 8 Rep. Attorney General v. Johnson, Ambl. 190.

Attorney General v. Sparks, Ambl. 201. Attorney General v. Tonner, 2Vez. Jun. 1.

(m) In the case of Arnold v. Attorney General, it was attempted to diffinguish that case from the case of Thetford School, by the circumstance of the whole fund having been devised in the latter instance, and the increase of it being subsequent to the death of the testator, and accidental; whereas in the former case the particular uses and bequests did not exhaust the whole of the fund, but fuch diffinction was over-ruled. It is also observable that in the Thetford case there was no legacy to the heir at law, whereas in the case of Arnold v. Attorney General there was. The principle therefore feems to be as stated in the case of Thetford School; that as the charity must have borne the loss if the value of the thing devised had decreased, it shall enjoy the benefit of its increase; and the court

fion in fee of divers lands let on leafes on which in all 701. per annum was referved, was granted by king H. 8. to the Corporation of Coventry, 4001. of the purchasemoney was paid by the corporation, and 1000l. by Sir T. W., but in the grant, the corporation was faid to be the purchasers, and it was by the deed declared that the whole 701. per ann. should be applied to feveral charities therein mentioned, the leases expiring, the value of the lands were greatly increased, but the furplus had been all along received by the corporation of C. the lands themselves not being given to the charities, but particular rents out of the lands; and it was strongly infifted, that the articles mentioning the corporation to be purchasers, there could

will even extend the bounty beyond the number of objects specified by the testator, provided they be of the same description with those pointed out by the testator. Attorney General v. Haberdasher's Company, 4 Bro. Ch. Rep. 103. Attorney General v. Earl of Winchelsea, 3 Bro. Ch. Rep. 373. or will increase the bounty limited to the objects, Attorney General v. Minshull, 4 Vez. 11. Whether heir or devisee shall have benefit of a void devise, see Jackson v. Hurlock, Ambl. 487. Gravenor v. Hallum, Ambl. 643. Wright v. Row, 1 Bro. Ch. Rep. 61.

be no averment received to the contrary, and although a charity is not barred by length of time (n), or any statute of limitations, yet it is an evidence, that the surplus belonged to C. because they have enjoyed it ever since the purchase, but the defendants were ordered to account for the improved value of the land, and the charities to be augmented in proportion (3).

(3) Attorney General v. Mayor, &c. of Coventry, aVern. 397.

(n) See the case of St. Michael's parish, Bath, against the Corporation of Bath, Ch. T. T. 1798, in which the possession of the corporation, for many years, was held to afford a strong presumption against the claims of the parish.

CHAP. II.

Of Guardians of Infants and Lunatics.

SECTION I.

* THE king is also an universal guardian to infants, and ought in the court of Chancery to take care of

* There are in law feveral kinds of guardians.

As, 1st, jure naturæ, the father of his heir apparent till twenty-one; and this was inseparable from his person.

2dly, In focage, jure gentium, the next of kin to whom the lands could not descend; and this was only of things that lie in tenure till fourteen. Of others, he might choose a guardian, if he was of years to make a choice.

3dly, By the statute of 12 Car. 2. cap. 24. formed by Sir Matthew Hale; and this is in office and interest much the same with a guardian in socage. But it extends not to his lands by descent only, as that did, but to all his estate whatever, and may be till twenty-one, or any less time.

4thly, By custom, as in London, and other boroughs.

5thly, The spiritual court, of personal estate only.

6thly, The king, for allegiance and protection are reciprocal.

their

their fortunes (a). As, 1st, If they marry during their minority, to procure a fettlement;

(a) "How this jurisdiction was acquired by the Chancellor, it is not easy, says Mr. Hargrave, (Co. Litt 128. note) to state. The usual manner for accounting for it appears very unfatisfactory. See Earl of Shaftfbury's Case, Gilb. Rep. 172. faying, that his jurifdiction over idiots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former from a separate commission under the fign manual, but there is not any fuch to warrant the latter. The writs of ravishment of ward, and de recto de custodia, prove as little; for were not these returnable in the courts of common law, or though they had not been fo, how doth a jurisdiction to decide between contending competitors for the right of guardianship prove a power of appointing a guardian, when it happens that one is wanting. The writs de custode admittendo only relate to guardians ad litem. Reg. Bre. Orig. 198. a. The affertion that the appointment of guardians belonged to the Chancellor, before the erection of the court of wards, remains to be proved, or at least we, after a diligent fearch, do not find any authority in point. The passage referred to in Fleta, and the doctrine in Beverly's Case, 4 Co., by no means warrant the use made of them; for in neither is any notice taken of infants. Though, continues Mr. Hargrave, the case of infants, as well as of idiots and lunatics, should be admitted to belong to the court, yet fomething farther is necessary to prove that the Chancellor is the person constitutionally delegated to act for the king. It is no wonder, therefore, that Lord Hardwicke took occasion to disapprove of comparing

ment (b); for though, by the ecclesiastical law, a woman is of age to marry (1); yet,

(1) See 1 Bla. Com. 436.

paring the court's jurisdiction over infants with that over idiots and lunatics, ex parte Whitfield, 2 Atk. 315. As to the writs in the register, continues Mr. H., relative to the appointment or removal of guardians, they merely relate to fuits, which is of very different confideration from general guardians. See Index to Reg. Brev. Orig. tit. Custodes. Nor will it answer the purpose to attempt including guardianships in the idea of trusts, which are the present objects of equitable jurisdiction, as it must be seen that such attempt is an overstrained refinement; for though guardianship, in the common acceptation of the word trust, may be properly fo denominated, yet it as furely is not fo in the technical fense in which lawyers use the word; and Chancery exercises a jurisdiction over trusts: For, in this latter, trusts are invariably applied to property, especially real estates, and not to the person." It must not, however, be understood, that this learned annotator, by the above remarks, intends to controvert the present legality of the jurisdiction thus exercised in Chancery over infants, his intent being merely to shew, that fuch jurisdiction is not, as far as yet appears, of ancient date; and that, though it be now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Mr. Hargrave further observes, " that his conjectures as to the late commencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, according to which, the first instance to be found of a guardian appointed by the Chancellor, on petition without bill, Vol. II.

yet, by the temporal law, she cannot dispose of her fortune, and therefore the court will

was in 1696, in the case of Hampden. But, fince that time, the court of Chancery hath exercised the power of appointing guardians, without its being once called into question. Therefore, in the case of Lady Teynham v. Lennard, which was heard on an appeal to the Lords in 1724, the counsel for the respondent very properly stated, that the Lord Chancellor was intrusted with that part of the Crown's prerogative which concerned the guardianship of infants. 2 Bro. P. C. 539. Under the same idea, too, the last marriage act refers to the Chancellor for the appointment of a guardian to confent to marriage, where the infant is without a guardian, and the mother is not living. 26 G. 2. c. 33. 611." The doubt intimated by the learned annotator, as to the rightful origin of this point of jurisdiction exercised in our court of Chancery, must necessarily, with reference to his professional claims, have materially influenced the judgment and opinions of his readers; and it appearing to me to be of some confequence to refcue a branch of jurifdiction, fo falutary in its exercise, from the imputation of having originated in usurpation, I cannot refrain from submitting the observations which have occurred to me upon it. is observable, that Mr. H. rather relies on the insufficiency of the arguments adduced in support of the jurisdiction, than on any positive fact or reasoning against it. And, in so considering the subject, he has certainly a confiderable advantage over his opponents. By fome who maintain the jurisdiction of the court in this particular, it is faid, that upon the abolition of the court of wards, the care which the Crown was bound will make fuch a disposition of the fortune of the ward, as may be most beneficial for her.

to take as guardian of its infant tenants, was totally extinguished in every feudal point of view, but resulted to the king in his court of Chancery, together with the protection of all other infants in the kingdom. 3 Bla. Com. 426, 427. From this it might be inferred, that the jurisdiction of the court of wards and liveries was protective of infants in general; whereas the statute of H. 8., by which the court of wards was erected, expressly confines the jurisdiction of that court to wards of the Crown; and it is scarcely necessary to remark, that when a new court is erected, it can have no other jurisdiction than that which is expressly conferred; for a new court cannot prescribe. 4 Inft. 200. But if the statute 32 H. 8. does not confer a general jurisdiction in the case of infants, but merely a particular jurisdicton as to wards of the court, it should feem to follow, that the general superintendance of the Crown over infants, as pater patria, if it existed at common law, was not affected by the statute, except in those cases to which it expressly refers. those cases were, are particularly enumerated by the flatute, and also in the instructions to the court of wards and liveries, prefixed to Ley's Reports. See also Reeve's Hif. Eng. Law. 4 v. 259. That in every civilized state, such a superintendence and protective power does fomewhere exist, will scarcely be controverted. That if not found to exist elsewhere, it may be prefumed to vest in the Crown, will not, I think, be denied. Affuming, therefore, that the general fuperintendence of infants did originally vest in the Crown, I shall conclude that, et ratione, it is now exercifed Q 2

her. But if she was of full age at the time of her marriage, then she was out of the care.

exercised in the court of Chancery, as a branch of its general jurisdiction. But it has been asked, Why, if no particular warrant be necessary to the court in the care of infants, is a separate commission under the fign manual necessary to authorise the Chancellor's jurisdiction in the case of idiots and lunatics, which are also referred to the head of general protection? The answer is, that the custody of persons and lands of idiots and lunatics, at least of fuch as held lands, was not anciently in the crown, but in the lord of the fee. The 17 Ed. 2. c. o., (or, as Lord Coke and others suppose, an earlier statute, see 2 Inst. 14.) gave to the king the custody of idiots, and also vested in him the profits of the idiots lands during his life; by which the crown acquired a beneficial interest in the lands; and as a special warrant from the crown is in all cases necessary to the grant of its interest, the separate commission which gives the Chancellor jurisdiction over the persons and estates of idiots, may be referred to fuch confideration. And, with respect to the care of lunatics, the statute 17 Ed. 2. c. 10., enacts, that the king shall provide that their lands and tenements shall be kept without waste. The statute confers merely a power, which cannot be confidered as included within that general jurifdiction conferred long before by the great feal; and, therefore, for the delegation of this new power, a separate and special commission was necessary. But see the case of Oxenden v. Ld. Compton, 2 Vez. Jun. 71., in which Lord Loughborough C. is reported to have stated, that the statute 17 Ed. 2. c. 10. is not introductive of any new right

care of the court; and the court cannot at all interpose, though she be under age,

as

in the crown. Others, who have attempted to support the general jurisdiction of the court of Chancery upon this point, have reforted to the circumstance of writs of ravishment of ward, and de recto de custodia issuing out of Chancery; and others have attempted to support it upon the notion of a guardianship being a trust. Mr. Hargrave has, in my opinion, given a sufficient answer to the first class of cases, namely, of the writs of ravishment of ward, &c. by observing, that those writs are returnable in courts of common law; and, with respect to the idea of a guardianship being a trust. though I think it founded fo far at least, as to entitle any court of equity to call upon the guardian to account, it does not, in my opinion, touch the point which respects the right of a general and exclusive fuperintendence over the interests of infants in the court of Chancery. If fuch a power be a mere truft, every court of equity has a concurrent jurisdiction upon the subject; but quare, if the court of Exchequer, as a court of equity, has fuch concurrent juri diction? It may indeed appoint a guardian ad litem to manage the defence of the infant, if a fuit be commenced against him; a power which is incident to every court of justice. It may also, when the interest of an infant comes before it judicially, provide for its fecurity and protection; but whether it can appoint a guardian to an infant for general purpoles, where none is appointed; or whether it can, in an equal extent, exercife that protective power which watches over the interest of infants in the court of Chancery, is a point which I do not find any where folemnly determined,

as fome fay, unless where the husband is plaintiff here in Chancery, to have the trustees

and which, with reference to the fiction upon which the equitable jurisdiction of the court of Exchequer is founded, I should think at least doubtful. That the general jurisdiction exercised by our court of Chancery, in the cases of infants, flows from its general authority, is further evinced by the concurrent jurifdiction exercised by the Master of the Rolls, and by the appellate jurisdiction of the House of Lords, neither of which have any jurisdiction in the case of idiots and lunatics. Upon the whole, I fubmit, that the general superintendence and protective jurisdiction of the court, in the case of infants, is a delegation of the duty of the Crown; that its general jurifdiction was not even suspended by the statutes of H. 8., erecting the court of wards and liveries. That the case of idiots and lunatics is diffinguishable; the jurisdiction exercifed in Chancery, as to the first, being the grant of an interest, and, in the latter, the delegation of a power conferred by parliament. With respect to the extent of the jurisdiction of the court of Chancery, as protective of the persons and interests of infants, it may be material to observe, that the court may interpose even against that authority and discretion which the father has in general in the education and management of his child. Duke of Beaufort v. Bertie, 1 P. Wms. 702. Butler v. Freeman, Ambl. 302. Lord Shaftsbury's Cafe, 2 P. Wms. 117. Potts v. Norton, 24th April, 1792, cited in Lord Shaftesbury's Case. Cruse v. Orby Hunter, MSS. Sittings after T. 1790. Powel v. Cleaver, 2 Bro. Ch. Rep. 499. But, quare, if such child must not be a ward of the court? ex parte Warother favour of the court: Then, indeed, when they had such a hand upon him, they may make him do such things as shall be reasonable (c), otherwise there is no colour

ner, 4 Bro. Ch. Rep. 101, 102. A multo fortiori, it may interpose against persons who derive their whole authority from the father. Therefore, though the court cannot remove a testamentary guardian appointed according to the statute, or consider his miscondust a contempt, unless the infant be a ward of the court, Goodall v. Harris, 2 P. Wms. 561., yet it may impose such restrictions as will prevent him from prejudicing the interests of his ward. Foster v. Denny, 2 Ch. Ca. 237. Roach v. Garvan, 1 Vez. 160. As to guardians at common law, it seems admitted, that they may be removed, or be compelled to give security, if there appear any danger of their abusing either the infant's person or estate. Foster v. Denny, 2 Ch. Ca. 237.

- (b) If therefore a man marry a ward of the court, without the confent of the court, he shall be committed for such contempt, though it appear that he knew not that she was a ward of the court, Herbert's case, 3 P. Wms. 116, and there must be a proper settlement made on the wise before such contempt can be cleared. Stovens v. Savage, 1 Vez. Jun. 154. And, quære, if the contempt can be cleared by the ward attaining her age, though she should be ready to waive her claim to a settlement, see Stackpoole v. Beaumont, 3 Vez. 89.
 - (c) This equity is not peculiar to infants wards of

(2) Micoe v. Powell, 2 Vern. 39.

colour in it (2). 2dly, This court, upon application made to it by guardians, has fettled the maintenance of infants (d).

the court, it extends to all cases, in which the husband feeks through the medium of the court to make his legal right to his wife's property available, fee B. I. c. 2. f. 6. B.I.c. 4. f. 24. neither is this branch of jurisdiction peculiar to the court of Chancery, it equally extends to the court of Exchequer. It feems also, that as the husband might defeat or prejudice the equity of the wife by affignment of her property, though in court, the wife may by her next friend institute a suit to restrain such assignment. See Ellis v. Ellis, Ch. July 1793. MSS.

(d) It was once conceived that a bill was necessary for the purpose of such an order, but it is now settled that it may be done by petition; fee ex parte Kent, 3 Bro. C. R. 88, and ex parte Salter, 3 Bro. C. R. 500, where the cases are brought together, upon the authority of which the practice now proceeds. And as the court will allot maintenance for the infant out of the produce of his estate, it will also, in so doing, consider the circumstances and state of the family; as where there is an elder fon an infant, and younger children who have no provision, the court will allow a more ample maintenance to the guardian of the eldeft fon, by which the younger children may be maintained. Hervey v. Hervey, 2 P. Wms. 21. Sandys v. Duke of Athol, 2 Atk. 447. Petre v. Petre, 3 Atk. 511. Roach v. Garvan, 1 Vez. 160. Style v. Style, July 1790. MSS. And as the court will in some cases order maintenance where none is directed, so in other

And a court of equity may, by the approbation of an infant's relations, allot the infant maintenance out of a trust estate, though there be no provision in the trust for that purpose: and this is founded on natural equity (3). But Chancery never allows the principal to be lessened in maintenance of an infant (e). 3dly, If a man intrudes upon an infant, he shall receive the profits but as guardian, and the infant shall have an account against him in Chancery as guardian (f). For

(3) Englefield v. Englefield, 2 Vern. 236. Ld. Rofeberry v. Taylor, 26 Jan. 1702. 16 Vin. Ab. 442, 443.

in

other cases it will refuse to apply the fund for maintenance though so directed, if the father be living and of sufficient ability to maintain his child. Hughes v. Hughes, I Bro. Ch. Rep. 387. That the court will in some cases allow the principal to be broken in upon, see Barlow v. Grant, I Vern. 255. Harvey v. Harvey, 2 P. Wms. 22.

- (e) See contra Barlow v. Grant, I Vern. 255. where the legacy is of small amount.
- (f) Though it is one of the peculiar duties of a court of equity to protect the rights of infants, it must not, as has been already observed, thence be inferred that they will at any period, or under any circumstances, act upon such indulgent disposition; for if an infant neglect to enter within fix years after he comes

(4) Newburgh v. Bickerstaffe, 1 Vern. 295. Morgan v. Morgan, 2 Atk. 489.

in the confideration of this court, he shall be looked upon as trustee for the infant (4). And if a man, during a perfon's infancy, receives the profits of an infant's estate, and continues to do so for feveral years after the infant comes of age, before any entry is made on him; yet he shall account for the profits throughout, and not during the infancy only. And fo it feems at law, he should be charged in an action of account, as tutor alienus.

of age, he is as much bound by the statute of limitations from bringing a bill for an account of mefne profits, as he is from an action of account at common law. Lockey v. Lockey, Pre. Ch. 518. See I vol. 149. note (m).

at age of a most of the arms, and

Direction and the College of the Col beviller as value of the said the said would end as the America very remaining to allowed was us like well to na filoti a nambogko agoaleksa kasi noqualor, enokua

a to relieb unmany but the one of the day of

temps the sails traveral malays so, so or fail on

SECTION II.

GUARDIANS are appointed (g) by writ for infants, and one or more guardians jointly (1), and the court of Chancery may assign one of the six clerks to be guardian to an infant (2). But a guardian cannot be otherwise appointed, than by bringing the infant into court, or his praying a commission to have a guardian assigned him (3). Where there is a guardianship by the common law, this court will intermeddle and order: but if there be a guardian by act of parliament (b),

(1) Bertie v. Ld. Falkland, 3 Ch. Ca. 136. (2) Anon. 2 Ch. Ca. 164. Offley v. Jenny, Nelf. Rep. Ch.

(3) Lloyd v. Carew, 1 Eq. Ca. Ab. 260. pl. 2.

(g) Guardians are appointed in Chancery where such appointment is necessary to the purpose of protecting the infant's general interest, or for the purpose of sustaining a suit, or for the purpose of consenting to the marriage of the infant.

(b) By the law of England there are three manner of guardianships, viz. by the common law, by statute law, and by custom. By the common law there are four manner of guardians, viz. guardian in chivalry, guardian by socage, guardian by nature, guardian by reason of nurture. Co. Litt. 88. b. Ratcliffe's case, 3 Rep. 37. b. Though guardianship in chivalry is

now

(4) Foster v. Denny, 2 Ch. Ca. 237. Roach v. Garven 1 Vez. 158. Lecone v. Sheirs, 3 Vern. 442. it cannot remove him or her (4). Yet in this, and all other like cases, they shall give

now taken away by the 12 Ch. 2. c. 24, yet as the knowledge of some general points concerning it cannot but be useful, I must beg to refer to Mr. Hargrave's note, Co. Litt. 93, note (11), in which the leading points upon it are brought together. See also 3 Com. Dig. title Guardian. With respect to guardianship by nature, the subject appears to be involved in confiderable obscurity, principally occasioned by the various and indefinite manner in which the right to fuch fpecies of guardianship, and the infants who are objects of it, have been considered. As to the right to guardianship by nature, Chief Baron Comyns states, that guardianship by nature extends only to the father, and denies the right of the grandfather to the wardship of the heir apparent, and refers to George's case, 6 Rep. 22.; but upon this point Mr. Hargrave observes, that "it feems that not only the father but also the mother, and every other ancestor, may be guardians by nature, though with confiderable differences, fuch as denote the fuperiority of the father's claim. The father hath the prior title to guardianship by nature; the mother the fecond; and as to other ancestors, if the infant happen to be heir apparent to two, as to both a paternal and maternal grandfather, perhaps in this equality of rights, priority of possession of the infant's person may. decide the preference, according to the general rule in aquali jure melior est conditio possidentis. But this difference merely respects the order of succession to guardianship by nature. But whilst the tenure by knightsfervice continued, there was another difference which more strongly marked the superiority of this guardiangive fecurity not to marry the child, infra annos nubiles, or confent or be aiding to the

ship when claimed by the father, for he was entitled to the custody of the infant's person even against the lord in chivalry. But the mother and other ancestors were not allowed to have the same preference. It is by this last diversity that Lord Coke in Radcliffe's case, 3 Rep. 38. b. reconciles the books, which appear to exclude the mother and all other ancestors except the sather, from guardianship by nature; it being observed by him, that they only apply to those cases, in which the right to the infant's person was in contest with the lord in chivalry." Co. Litt. 105, Hargrave's note (12).

With respect to what infants are objects of this species of guardianship, we find in some cases that the father and mother are denominated the natural guardians of all their children. Roach v. Garvan, I Vez. Mellish v. De Costa, 2 Atk. 15. Marshall, 2 Atk. 70. and in some cases, even the parents of illegitimate children are so considered. Ord v. Blackett, 9 Mod. 117; and in other cases, the guardianship of female children under fixteen, as given to the father and mother by the statute of P. and M., is faid to be jure natura. Radcliffe's case, 3 Rep. 39. a. Upon which diela, Mr. Hargrave observes, "according to the strict language of our law, only an heir apparent can be the subject of guardianship by nature; which restriction is fo true that it hath even been doubted whether fuch a guardianship can be of a daughter whose heirship though denominated apparent, yet being liable to be superseded by the birth of a son, is in effect rather of the prefumptive kind. Radcliffe's cafe,

Mr.

the marriage of fuch child, post annos nubiles, during minority, without acquaint-

cafe, 3 Rep. 38. b. Therefore, when guardianship by nature is extended to children in general, or to any but such as are heirs apparent, it is not conformable to the legal fense of the terms amongst us, but must be understood to have reference to some rule independent of the common law. Thus, when in Chancery the father and mother are styled the natural guardians of all their children born in marriage, or of any of their illegitimate iffue, we should suppose those who express themselves so generally to refer to that fort of guardianship, which the order and course of nature, fo far as we are able to collect it by the light of reafon, feems to point out, and to mean that it is a good rule to regulate the guardianship by, where positive law is filent; and it is in the discretion of the lord chancellor to fettle the guardianship. So too, when Lord Coke fays the custody of a female child under fixteen, to which the father, and after his death, the mother, is entitled, by the provisions of the St. 4 and 5 P. and M., is jure natura, we should understand him to mean, not that fuch a custody was a guardianship by nature, recognized by our common law, but merely that it was a statutary guardianship, adopted by the legislature, in conformity to the dictates of nature, and upon principles of general reasoning. though what our law calls guardianship by nature, is thus confined to the heir apparent, yet we must not thence conclude, that parents have not a right to the custody of their other children, for our law gives the custody of them to their parents till the age of fourteen by the guardianship of nurture; Co. Litt. 106. a.

ing this court therewith (5). But the (6) Faster v. Chancery cannot restrain the infant from danne. marriage

mond's cafe, Forreft. 58.

Smith v. Smith, 3 Atk. 304.; and fee Eyre v. Countels of Shaftsbury, 2 P. Wms. 112.

Mr. Hargrave, having explained who are entitled to the guardianship by nature, and what infants are the objects of it, concludes with an enumeration of the following particulars concerning it: 1st, This guardianship continues till the infant attains the age of twenty-one. 2d, It extends no further than the cuftody of the infant's person. 3dly, It yields as to the custody of the person to guardianship in socage, where the title to both guardianships concur in the same individual, as they necessarily do in the case of father or mother, if lands, held by a focage tenure, defcend on the heir apparent, being an infant, and may in the case of other ancestors. But guardianship in socage, ending at fourteen, he prefumes, that after that age, the father or other ancestor, having a like title to both guardianships, becomes guardian by nature till the infant's age of twenty-one; fee Carth. 384. And lastly, the father may disappoint the mother and other ancestors of the guardianship by nature, by appointing a testamentary guardian under the statutes of Philip and Mary, and Charles the Second."

"Guardianship by socage, like the one in chivalry, fprings wholly out of tenure; therefore the title to it cannot arife, unless the infant is feized of lands or other hereditaments, lying in tenure, holden by focage. Like guardianship in chivalry, it is deemed to take place on a descent only, though some have argued to the contrary; fee Quadring v. Downs, 2 Mod. 176., where the point is decided; fee also

Vin.

marriage ad annos nubiles. But if a person appointed guardian, pursuant to the statute,

Vin. Ab. tit. Guardian (I). The title to this guardianship is in such of the infants next of blood as cannot have by descent the socage estate; in respect of which the guardianship arises by descent, without any distinction between the whole and half blood. If there are two or more in equal degree, he who first gains posfession of the heir shall have the custody of him; except where they happen to be brothers or fifters, or to be the infant's lineal ancestor, the law preferring the eldest in the former case, and the father or other male ancestor in the latter. But if the infant derives lands by descent, both ex parte paterna and ex parte materna, in which case it may be possible not to find any next of kin incapable of inheriting to the infant; the next of kin of either fide, first seizing the infant, is entitled to the custody of his person, and the custody of the lands coming ex parte paterna, goes to the maternal heir; and so vice ver sa, as to the lands coming ex parte materna. Should however the infant derive lands by descent, in fuch a way as lets in both the paternal and maternal blood fuccessively to the inheritance, but with a preference of the former; as where the infant derives lands by descent to a brother, who was the first purchaser, and there is no next of kin but such as may inherit from the infant, it feems unfettled who should have the guardianship. If the person entitled to be guardian in focage, is himfelf under the custody of a guardian, the latter is entitled to the custody of both; to the former in his own right, and the latter, pur cause de ward, that is, in right of his wardship of the former. But, as it is wholly for the infant's benefit, and not instatute, (viz. 12 Car. II. cap. 24.) dies or refuses to take upon himself the guardian-ship

any respect for the guardian's profit, it is not a subject either of alienation, forfeiture, or succession, as wardship in chivalry was; and consequently if the guardian in focage becomes incapable, or dies, the wardship devolves upon the person next in degree of kindred to the infant, not being inheritable to him. Fitzherbert, indeed, in his Natura Brevium, cites two cases of Edward the Third, in which guardian in focage granted the wardship to a stranger, and the grant was held to be good; F. N. B. 143. The fame author too, in his Abridgment, gives another case of the same reign, according to which a leafe of guardianship in socage was pleaded; Fitzh. Abr. Garde, 161. But possibly these cases import only, that a guardian in focage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward, not that the guardianship itself may be transferred by bargain and fale. However, should these ancient authorities not bear the former construction, they feem fufficiently answered by the doctrine and practice of later times; for in them, the acknowledged qualities of guardianship in socage being, that it is a personal trust wholly for the infant's benefit, and neither transmiffible by fuccession, nor devisable, are not confistent with its being affignable; and we have Lord Chief Juftice Vaughan's authority for faying, that, even in his time, common experience proved the contrary; fee Plow. 293. Vaug. 181. It extends not only to the person and socage estates of the infant, but also to his hereditaments not lying in tenure, and even to his copyhold estates, unless there is a special custom for the Vol. II. lord's

(6) Lloyd v. Carew, 1 Eq. Ca. Ab. 260. pl. 2. Darcy v. Ld. Holderness, 1 P.Wms. 703. note. ship (6), the lord chancellor may appoint a guardian (i). As to the custody of lunatics,

lord's appointing a guardian of them; Egleton's cafe, I Ro. Abr. 40.; fee also Hutt. 17., and 2 Lutw. 1181. But, whether the guardian in focage is entitled to take into his custody the infant's personal estate, we have not yet been able to ascertain by any express authority. However, we are inclined to think that personalty is included, except where by the custom of a particular place it happens to be liable to a different custody; our idea being, that the custody of the infant's person draws after it the custody of every species of property, for which the law hath not otherwife provided. This idea receives some countenance from the instances of copyholds and hereditaments not lying in tenure; for including which, it will be difficult to account by any other reason than the one we give for including personalty; it is also strongly confirmed by the manner in which the 12 of Cha. 2. c. 24. regulates the powers of the guardian which it enables a father to appoint. And authorizing fuch guardian to take the custody of the infant's personal estate, as well as of his lands, tenements, and hereditaments; it provides, that he may bring fuch action or actions in relation thereto, as by law a guardian in common focage might do; words almost necessarily importing, that the perfonal estate is equally an object of the custody of the guardian in socage with the infant's real property. Yet we must apprize the reader, that there is an expression of Lord Chief Justice Vaughan, in his reports, which conveys, or feems to convey, a different opinion; for, speaking of guardian under the statute of Charles the Second, he says, this new guardian hath the cuftody, not only of the lands descended

natics, it is no question of right, but of prudence, and where no right, there is no wrong.

descended or left by the father, but of lands and goods any way required or purchased by the infant, which the guardian in socage had not; Vaugh. 186. It is superseded both as to the body and lands, if the father exercises his power of appointing a testamentary or other guardian, according to the statute of 12 Cha. 2. c. 24. Regularly it ends, when the infant, whether male or female, attains sourteen; though some say, that this must be understood, only where another guardian, either by election of the infant, or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time; Andr. 313." Hargrave's note (13).

"As to guardianship by nurture, it only occurs where the infant is without any other guardian; and none can have it except the father or mother. 8 E. 4. 7. b. Br. Guard. 70. 3 Co. 38. It extends no farther than the custody and government of the infant's person, and determines at fourteen, in the case both of males and females. Lord Chief Baron Comyns indeed refers to Fleta, as if, according to that ancient book, grandfathers and great grandfathers might be guardians by nurture; 3 Com. Dig. 421.; but the passage cited doth not point at this species of guardian, it describing the patria potestas in general, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianship, as our own law regulates it." Hargrave's note (13), Co. Litt. 119. b.

By construction of the statute 4 and 5 P. and M. c. 8., the father might, by deed or will, assign a R 2 guardian

wrong. It shall never in this, or in any other case, be committed to any that will make

guardian to any woman child under the age of fixteen. But, by the 12 Car. 2. c. 24., which, confidering the imbecillity of judgment in children of the age of fourteen, and the abolition of guardianships in chivalry, which lasted till the age of twenty-one, it is enacted, that where any person shall have any child or children, under the age of twenty-one years, and not married at the time of his death, it shall be lawful for the father of fuch child or children, whether born or in ventre fa mere, or whether such father be within the age of twenty-one years, or of full age, by deed executed in his life-time, or by his last will, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall respectively think fit, to dispose of the custody of such child for and during such time as fuch child shall continue under the age of twenty-one years, or any less time, to any person or persons in possession or remainder, other than popula recufants, as the father shall appoint. Guardians so appointed are called testamentary guardians, or guardians by statute.

The above clauses may be confidered under the following heads:

1st, Who may appoint a testamentary guardian. 2dly, To what child a testamentary guardian may be appointed.

3dly, Who may be appointed.

4thly, . How fuch appointment may be made.

5thly, When such appointment determines; and, 6thly, The effect of such appointment.

Ist, As

make gain of it, or who is concerned to outlive the lunatic, as being nearest of blood,

1st, As the father only is authorized to appoint a testamentary guardian to his child, an appointment by the mother is absolutely void. Bedell v. Constable, Vaugh. 180. Ex parte Edwards, 3 Atk. 519. So also is an appointment by the guardian appointed by the father, for it is a personal trust, and not assignable. Bedell v. Constable, Vaugh. 179. Mellish v. Da Costa, 2 Atk. 15. It has also been held, that a copyholder is not within the statute, the custody of the infant belonging to the lord. Clench v. Cudmore, 3 Lev. 395.

2dly, The father's power of appointment extends to all his legitimate children under twenty-one, and unmarried at his decease, or born after. I have confined it to legitimate children; for, though a natural daughter is considered to be within the statute of P. and M., Rex v. Cornesorth, Stra. 1162., natural children are not within the statute of Ch. 2. But though not within the statute, the court will, unless some objection be shewn, adopt the nomination of the stather, Ward v. St. Paul. 2 Bro. C. R. 583.; and Peckham v. Peckham, there stated in a note.

3dly, Though popish recusants are the only persons named in this act, there are other persons disabled by other statutes. See 9 and 10 W. c. 32., and the statutes relative to the qualifications for officers. See also Swin. part 3. s. 10.

4th, Though the father may dispose of the custody of his infant child by deed or will, yet if he dispose of

blood, and entitled to the administration; and the allowance must be liberal and honourable (7).

(7) See b. 1. 7 c. 2 f. 2. note (0).

Lord Shaftsbury v. Hannam, Finch's Rep. 323. But if there be a covenant in the deed, that the father will not revoke it, equity will not set it aside, unless the condition be complied with, or the trust abused. Lecone v. Sheires, I Vern. 442. It has also been held, that a will merely appointing a testamentary guardian, need not be proved in the spiritual court; for as it is an appointment which takes effect solely by act of parliament, the temporal court should be judges thereof. Lady Chester's Case, I Ventr. 207. And as the statute prescribes no particular form of disposition or appointment, it is immaterial by what words the guardian is appointed, provided the sather's intent be sufficiently apparent. Swinb. p. 3, c. 12.

5th, That as the statute declares such guardianship shall continue till twenty-one, if so prescribed by the sather, it shall not be determined even by the marriage of the infant. Mendez v. Mendez, 3 Atk. 625. If a man devise the custody of his heir apparent, and no time is mentioned, yet it is a good devise of the custody within the act, if the heir be under sourteen at the death of the father; because, by the devise, the guardianship is changed only as to the persons, and left the same as to the heir. But if the heir be above sourteen, then the devise is void for the uncertainty; for the act did not intend that every heir should be in custody until twenty-one, but only so long as the sather shall appoint, not exceeding that time. Bedell v. Constable, Vaugh. 184.

6th, That

6th, That as the father, though under age, may grant the custody of his heir, the land will follow as an incident given by law to attend it, though the father, being under age. could not have devised or demised his land in trust for him directly. Bedell v. Constable, Vaugh. 178.

The statute 12 Car. 2. c. 24. §8, 9., further provides, that the appointment of fuch testamentary guardians shall be effectual against all claiming as guardians in focage, or otherwife; and that the guardian fo appointed shall have ravishment of ward or trespass, and recover damages as for the ward's benefit; and that fuch guardian shall have the custody of the infant's estate, both real and personal, and have the same actions in relation to them as guardian in focage. But though a testamentary guardian shall have custody of the infant's real estate, a lease granted by him of the infant's real estate is absolutely void. Roe on dem. of Parry v. Hodgson, 2 Wilf 129, 135. And though testamentary guardians are not so immediately subject to the direction of the court of Chancery, yet they are within its preventive and controlling jurisdiction. If, therefore, the court has reason to apprehend that a testamentary guardian meditates an injury to his ward, it will interpose, and if possible prevent the mischief. Duke of Beaufort v. Bertie, I P. Wms. 704, 705. But see Morgan v. Dillon, 9 Mod. 135.; which decree was reversed by the House of Lords. 3 Bro. P. C. 341. But whatever doubt may exist as to the jurisdiction of the court of Chancery to remove a testamentary guardian, merely for the purpose of preventing mischief to the ward, there can be no doubt but that the court may control a guardian who has actually mifconducted himself. See Anon. 1 Sid. 424. See also the case of Lord Noel v. Somerset, referred to in Roach v. Gar-

van, I Vez. 160. That a testamentary guardian may be removed, if he become a lunatic, fee ex parte Lady Ann Brydges, H. T. 1791. That the power of a father to appoint a testamentary guardian to semale children, under 4 and 5 Ph. and M. c. 8., does extend to natural children, see Rex v. Corneforth, Stra. 1162; and that natural children are not within the statute of Charles 2., see Ward v. St. Paul, 2 Bro. Ch. R. 583. But, though natural children are not within the act of Ch. 2., the court will adopt the nomination of the reputed father, without referring it to a Master, unless fome objection be flated to the person named by the father. Ward v. St. Paul, 2 Bro. Ch. Rep. 583.; and Peckham v. Peckham, there cited in a note.

(i) And a guardian fo appointed is competent to consent to the marriage of an infant. Exparte Birchell, 3 Atk. 813. But a petition, that a guardian may be affigned, unless to carry on a fuit, or protect an interest, must be pursuant to the statute. Ex parte Becher, I Bro. Ch. Rep. 556.

SECTION III.

TUTOR or guardian was looked upon in the civil (1) law to be in the place of a father to the minor, who, by reason of the infirmity of his age, was deemed unable to take care of himself; and the particulars of his charge was, first, of his person and education, and to lay out all reasonable expences for him, in proportion to the value of his estate, fince it was not his estate alone, but his morals, that he was appointed to look after. But, in the fecond place, he was to take care of his patrimony, and to be as provident of his affairs, as a prudent master of a family is of his own; and the power of the tutor was limited to what might be profitable to the minor, for fo far they thought his authority established by justice And fo it feems formerly in the law of England (2), he that was constituted tutor or guardian ought to fee that the heir be well brought up, and that his estate be safely kept; for he can do nothing but for the profit and benefit of the infant.

(1) Dig. lib 26. tit. 7, 27. 30. Cod. lib. 5. tit. 59. Vinnius, in Inft. lib. 1. tit. 21.

(2) Cowel's In . l.b. 1. tit. 21, 24.

infant, nor intermeddle with any thing but of what he may render an account (k). And he was bound to put in fecurity before his admission, and to make oath to administer the affairs of the minor to his profit and benefit; to exhibit a true and faithful inventory of all the goods, and to render an exact and true account of his office, whenfoever it was required by the Judge, which is the same oath that was administered to all executors and administrators. But this law is not now observed here, as it was in Rome, to the great detriment of many minors. But, both in Chancery and in the civil law, an infant might call his guardian to an account, even during his minority, if there fell out any thing that made it necessary.

⁽k) And therefore a guardian cannot present to a church. Co. Litt. 89. a. Cro. Jac. 99. Hearle v. Greenbank, 3 Atk. 715. Arthington v. Coverley, 2 Eq. Ca. Ab. 518. But, quare, Whether the court will not control the presentation by the infant, if improperly obtained, without the concurrence of the guardian? See B. I. c. 2. s. 5.

BOOK THE THIRD.

Of Mortgages and Pledges.

CHAP. I.

Their Nature.

SECTION I.

It follows, in the next place, that we treat of mortgages and pledges. This kind of agreement was useless in a state of nature; because it was lawful for the creditor in that state, to seize on any part of the debtor's goods or estate, without any special contract (1). For right reason, and the nature of society, prohibits not all force, but that which is repugnant to society; that is, which deprive hanother of his right. For the end of society is, that, by mutual aid, every one may enjoy his own. And, as naturally every man may vindicate his own right, so, to profit another, in what he can justly, is

(1) Puff. b. 5. c. 10. § 16.

not

not only lawful, but also commendable. But civil society being ordained for the maintenance of tranquillity, there arises presently to the commonwealth a certain greater right over us, so far as is necessary to that end; and, therefore, so far it may and will prohibit that promiscuous right of resisting. Nor were there any mortgages of lands with us, while the feudal tenures were on foot (a); because such convey-

(a) The feudal fystem being, in its principles, inconsistent with the tenant's right of mortgaging his lands, may be reasonably considered as having, during its prevalence in this country, at least suspended the general exercise of such right; but that mortgages were not known in *England* prior to the introduction of that system, can by no means be correctly inferred, from no trace of them being apparent subsequently to the introduction, and during the continuance of such system.

The nature of a mortgage presupposes the right of alienation, at least for a certain time; and indeed it seems difficult to conceive, that, in any country in which such right of alienation exists, the qualified or conditional exercise of it, by way of mortgage, or at least the vadium vivum, should be wholly unknown. The temporary wants of mankind, in a state of civilized society, would naturally suggest such a mode of providing for them; and, accordingly, we find the lews,

conveyances were looked upon as a fort of fraud on the constitution. But when a licence of alienation was given about the time of H. 3., and it became a maxim in law, that the purity of a fee-fim-

Jews, in the earliest period, availing themselves of this species of alienation, as far as their law would allow, namely, mortgaging their lands until the enfuing jubilee. For an account of this folemnity, fee 2 vol. Ancient Universal History, p. 130, 131. From the Jews, the notion of mortgages is faid to have been derived to the Greeks and Romans; and we are by fome supposed to have borrowed it from the civil law. See 3 Ba. Ab. title Mortgage, and Powell on Mortgages. The origin of any usage is seldom of much concern, and, on the prefent subject, it appears to me to be wholly immaterial. I shall, therefore, merely remark, that though it was a rule in the feudal law, that feudalia invito domino aut agnatis non recie subjiciuntur hypotheca; yet that it appears from Craig, that, with the concurrence of the lord, the tenant might alien, and confequently might mortgage his lands. Feud. lib. 2. tit. 5. § 5. As to our having borrowed the idea of a mortgage from the civil law, Mr. Butler obferves, that it appears from Littleton, § 332., that they were introduced, less upon the model of the Roman pignus or hypotheca, than upon the common law doctrine of conditions: an observation which, however correct as to the mortgage itself, certainly does not apply to the equity of redemption, which, in courts of equity, is, prior to foreclosure, considered as an incident inseparable from it. Vide Vinnius in Inst. lib. 3. tit. 15. ple (2) \$ 332. Co. Litt. 205.

ple imported a power of disposing of it as the owner pleased, there were two ways of pledging lands introduced, which Littleton (2) distinguishes by the names of vadium vivum, and vadium mortuum. The first is, where a man borrows a fum of money of another, and makes an estate of lands to him, until he hath received the same out of the issues and profits; so that neither the money nor the land dies, or is loft. The other, where a feoffment is made upon condition, that if the feoffer pay to the feoffee fuch a fum by fuch a day, that then the feoffor may enter, &c. In this case, if he does not pay, then the land is taken from him for ever; and if he does, then the pledge is dead as to the tenant, &c.

SECTION II.

THESE forts of conveyances, being usually made in fee-simple, were exposed to many inconveniences; for the estate

estate being absolute at law, on default of payment, was subject to the dower of the wife of the feossee, and all other his real charges and incumbrances; and, therefore, to prevent this (b), the ancient course in mortgages was to join another with the mortgagee in the conveyance (1). But the court of Chancery, though at first they made a scruple of breaking in

(1)Nash v. Preston, Cro. Car. 190, 191. Madox's Formulare, 569.

(b) With the same view, mortgages, for a long term of years, were, at a very early period, introduced; fee Madox's Formulare, 230.; which was attended with this advantage, that, on the death of the mortgagee, the term and the right in equity to receive the mortgage debt vest in the same person; whereas, in cases of mortgages in see, the estate, on the death of the mortgagee, goes to his heir or devisee, and the money is payable to his executor or administrator. This produces a separation of rights, that is often attended with great inconvenience, both to the mortgagor and the mortgagee. On the other hand, in case of mortgages for years, there is this defect, that if the estate is foreclosed, the mortgagee will be only entitled for his term. To guard against which, it has been thought advisable to make the mortgagor covenant, that, on non-payment of the money, he will not only confirm the term, but also convey the freehold and inheritance to the mortgagee, or as he shall appoint, discharged of all equity of redemption." Mr. Butler's note (1), Co. Litt. 206.

upon the rules of law (c), have now fet this matter right; and fince the lands were originally only a fecurity for the money, therefore the payment of the money doth, in confideration of equity, put the feoffor in his first estate, as well after as before the condition broken.

(c) Lord Hale observes, that, in 14 Rich. 2., the parliament would not admit of redemption. See the printed Rolls, vol. 3. p. 259. And though the right to redeem within a certain period is now incontrovertibly established, yet I have not been able to trace the period when such right was first allowed.

SECTION III.

AND although, with respect to the furplus of the estate over and above the mortgage money, the mortgagee is usually looked upon in equity as a trustee for the mortgagor (d), yet there is a difference

(d) As to the nature of the estates of the mortgagor and mortgagee, it seems to be at length settled, that

ference betwixt a trust and a power of redemption. For a trust is created by the contract

as the mortgagee is confidered as holding the estate merely in the nature of a pledge, or security for payment of his money, a mortgage, though in see, (the legal estate in which descends to the heir at law,) is considered in equity only as personal estate.

Hence also a mortgagee, though in possession, will, in case of a living becoming vacant prior to foreclosure, be compelled in equity to present the nominee of the mortgagor; Jory v. Cox, Pre. Chan. 71. Amhurst v. Dawling, 2 Vern. 401.; and that, even though nothing but the advowson is mortgaged to him, and the deed contain a covenant, that, on any avoidance, the mortgagee should present: Mackenzie v. Robinson, 3 Atk. 550.; for, in fuch case, though the presentation is not deemed the subject of value, and therefore cannot be brought into the account, it might be a benefit beyond the fecuring of the principal debt, and lawful interest thereon; which decision over-rules that of Gardiner v. Griffith, 2 P. Wms. 403. In such case, however, it is faid, that the mortgagee of the advowfon might pray a fale. Mackenzie v. Robinson. But, quare, If such sale could be decreed pending an avoidance? The mortgagee may, however, grant leafes of the premifes, and avoid fuch leafes as have, fince his mortgage, been granted by the mortgagor.

As to the estate of the mortgagor, though formerly doubted whether he had more than a right of redemption, it is now established, that he hath an actual estate in equity, which may be devised, granted, and Vol. II.

contract of the party, and he may direct it as he pleases, and may provide for the execution of it, and therefore they only are bound by it who come in in privity of estate, or with notice, or without a consideration. As a tenant in dower is bound by it, because she is in the per; but not a tenancy by the curtefy, who is in the post. Nor shall any other, who comes in in the post, be liable to it, without express mention made by the party. But a power of redemption is an equitable right, inherent in the land, and binds all persons in the post, or otherwise; because it is an ancient right, which the party is entitled to in equity. And although, by the escheat, the tenure is extinguished, that will be nothing to the purpose, because the party may be recompenfed by the court for that, by a decree for rent, or part of the land itself, or some other fatisfaction. And it is of such consideration in the eye of

entailed, and of which there is a possession fratris, and a tenancy by the curtesy. Casborne v. Scarfe, I Atk. 603. But as to his possession of the mortgaged premises, he only holds them by the will or permission of the mortgagee, who hath been held intitled, by ejectment, and without notice, to recover against him or his tenant. Keeche v. Hall, Doug. 21. Moss v. Gallimore, Doug. 279. but see Da Costa v. Warton, 8 Term. Rep. 2.

the

the law, that the law takes notice of an equity of redemption, and makes it affignable or devisable (1).

(1) Pawlett v. Attorney-Gene-

ral, Hard. 469. Casborne v. Scarfe, 1 Atk. 605.

SECTION IV.

AND equity is part of the law of England, fo that it cannot in any manner of way be provided by agreement, in case of a mortgage, that the court of Chancery should not give relief (e). For such an agreement would be contrary to natural justice in the creation of it, and prove a

(e) This rule is not confined to cases of redemption of mortgages, it being at least a general rule, that the jurisdiction of a court of equity cannot be ousted by the agreement of the parties. Fry v. Porter, 1 Ch. Ca. 141. Wellington v. M'Intosh, 2 Atk. 569. The authority of which last case, though shaken by the judgment in Halfhide v. Fenning, 2 Bro. Ch. Rep. 336, is restored by the judgment in Mitchell v. Harris, 2 Vez. Jun. 129. There are however cases, the judgments upon which do not appear to be reconcileable with the above principle, that the jurisdiction of a court cannot be ousted by the agreement of the parties. I shall not, however, enter upon the discussion of those cases, but content myself with remarking, that, perhaps, the most effective security to the claims of justice is, to keep open the courts which are armed with the most extensive powers of administering it.

S 2

general

(1) Howard
v. Harris,
1 Vern. 191.
Newcombe
v. Bonham,
2 Ch. Ca. 61.
Talbot v. Bradill
1 Vern. 183.
Miller v. Lees,
2 Atk. 494.
(2) Jennings
v. Ward,
2 Vern. 520.

general mischief; because every lender would by this method make himfelf chancellor in his own case, and prevent the judgment of this court (1). Neither shall a man have interest for his money, and a collateral advantage befides for the loan of it, or clog the redemption with any by-agreement, fince this would be to let in all manner of extortion and usury (2). But there is a difference between mortgages of Exchequer annuities and common flock, the value of which depends upon imagination, rather than a real value; for annuities are a certain fecurity, and carry a constant interest, and therefore are to be confidered as mortgages of lands, and cannot be fold after forfeiture without foreclosure (f). Yet annuities mortgaged are now held irredeemable after forfeiture, unless there be an express agreement, that the mortgagee may fell after forfeiture (3).

(3) Manning v. Scott,

14th Nov. 1714. 15th Vin. Ab. 476. marg.

(f) So held by Lord Harcourt in Tucker v. Wilson, 1 P.Wms. 261. But the decree was afterwards reversed by the House of Lords. See 1 Bro. P. C. 494. See also Lockwood v. Ewer, 2 Atk. 303. In which case Lord Hardwick held, that it was not necessary to bring a bill of foreclosure on a mortgage of stock. But that there may be a foreclosure of such mortgage, see Tancred v. Potts, Rolls, June 20, 1749.

SECTION V.

A ND notwithstanding, that in a common mortgage, fuch covenants ought not to be regarded, for the general inconvenience that would follow (g); yet this reasoning cannot extend, where it is made with an intention to fettle the estate. besides the consideration of the money paid. As where the conveyance is in confideration of 100/. paid to him by a perfon that married his kinfwoman, upon condition, that if he did not repay the money with interest during his life, his heirs, &c. should then have no power to redeem; this court can neither shorten nor enlarge the time that is given by express covenant and agreement of the parties (1). So where there is a clause or provision to re-purchase in a conveyance,

(1) Bonham v. Newcomb, 2Ventr. 364.

⁽g) The circumstances which brought this case out of the general rule, that an estate cannot be a mortgage at one time, and an absolute purchase at another, I Vern. 192., are very fully observed upon by Lord Keeper North, I Vern. 232., in his reversal of Lord Nottingham's decree; see also Sir Nicholas Wolstan v. Aston, Hard. 511.

(2) Barrel v. Sabine, 1 Vern. 268. Endsworth v. Griffith, 15Vin. Ab. 468. c. 8. the time limited ought precisely to be obferved (2). But then this must be in case the court are fully satisfied, that it was not originally a mortgage, but an absolute purchase (b): or else a redemption may be decreed at any time within twenty years after the time of repurchasing is out.

(b) For if the parties appear to have intended a mortgage, the mortgagor shall be allowed to redeem, notwithstanding any condition that it should in any future event operate as a purchase; Manlove v. Ball, 2 Vern. Willett v. Winnell, I Vern. 488. Fulthorpe v. Forster, 1 Vern. 476. Copplestone v. Boxall, 1 Ch. Ca. 1. Clench v. Witherby, Rep. Temp. Finch, 376.; but see Floyer v. Levington, 1 P. Wms. 268. Mellor v. Lees, 2 Atk. 494. Tasburgh v. Echlin, 4 Bro. P.C. 142.; and Powell on Mortgages, 31.; a mortgage will not however be eafily prefumed against an absolute conveyance, especially if the possession has gone along with the conveyance; Cottrell v. Purchafe, Forrest. 61; but parol evidence is admissible, to shew or explain the real intention and purpose of the parties; though the conveyance be absolute; see Sir G. Maxwell v. Lady Montacute, Pre. Ch. 526. Walker v. Walker, 2 Atk. 98, Joynes v. Statham, 3 Atk. 388.

SECTION VI.

A ND in equity there is no time limited for the redemption of a mortgage; and the common doctrine in the court of Chancery is, that mortgages were not within the statute of limitations, however that statute may be mentioned fometimes as a proper direction to go by (i); for the courts of equity are tender of fettling any fet time, because there can be no question in whom the property of the pawn is, when I possess it as another's, and proscription was introduced only to put an end to fuits, and fettle property which would otherwife be uncertain. Besides, a man can never be injured, if he receives principal, interest, and costs; but the proprietor of the land is injured, if he

⁽i) No rule appears to have prevailed in the civil law, restrictive of the time of redemption; as to the reasons upon which is sounded the limitation of such right in our law, see Mr. Powell's Treatise on Mortgages, in which that point, and indeed the whole subject relative to mortgages, is considered with great exactness and discrimination; see also I vol. B. I. c. 4. § 27. note (s).

(1) 1 Eq. Ca. Ab. 313. note (a).

(2) Pearfon v. Pulley, 1 Ch. Ca. 102. Cloberry v. Symonds, 1 Vern. 397. parts with his possession under the true value (1). Yet where a man comes in at an old hand, the possession shall account no farther than for the profits made in his own time (2), and upon extraordinary circumstances, it may be reasonable to debar him altogether of the power of redemption; and so this court sometimes hath allowed length of time to be pleaded (k) in bar, when the mortgaged estate hath descended as a see, without entry or claim from the mortgagor, and where the possession would be entangled in a long account (3).

(3) Sanders

1 Ch. Rep. 97. Clapham v. Bowyer, 1 Ch. Rep. 110. Jenner v. Tracy. Belch v. Harvey, 3 P. Wms. 288. note (b). Frazer v. Moor, Bunb. 54.

(k) Though it seems agreed, that length of time may be pleaded in bar of redemption, yet the authority of the cases in which the defendant has been allowed to take advantage of such circumstance by demurrer, is very much shaken; Aggas v. Pickerall, 3 Atk. 225. Edsell v. Buchanan, 2 Vez. Jun. 83.

SECTION VII.

ND it feems, now the court will not relieve mortgages after twenty years, (for the statute of 21 Fac. cap. 16. did adjudge it reasonable to limit the time of entry to that number of years,) unless there are fuch particular circumstances as may vary the ordinary case, as infants, feme coverts (1), &c. (which are provided for by the statute itself.) And although these matters in equity are to be governed by the course of the court, yet it is best to fquare the rules of equity, as near the rules of reason and law as may be (1). So if there were infants: Yet (1) White v. the time having begun upon the ancef- eventr. 340. tor, it shall run even upon infants (m),

⁽¹⁾ With respect to persons labouring under any legal disability, it may be material to remark, that not only they, but their heirs, are not within the above rule as to redemption; Carnel v. Sykes, 1 Ch. Rep. 103. That the heir of the wife is bound to redeem, notwithstanding the tenancy by the curtefy of the husband, fee Anon. 2 Atk. 333. Corbell v. Barker, Anstr. Rep. 138.

⁽m) So also in the case of coverture or tenancy by the curtefy; fee Anon. 2 Atk. 333.

2) Knowles v. Spence, 1 Eq. Ca. Ab. 315. St. John v. Turner, 2 Vern. 418. Floyd v. Manfell, Gilb. Rep. 185. (3) Proctor v. Cowper, 2 Vern. 377.

as it is at law, in the case of a fine (2). But where a bill has been brought, and an account decreed within twenty years (n), a redemption may be decreed (3) upon the foot of that account. So if the mortgagor agreed the mortgagee should enter. and hold till he was fatisfied (a); this is in nature

(n) In the case of St. John v. Turner, 2 Vern. 418., which may appear irreconcilable with this rule, it is observable that the decree was not within twenty years.

(0) So if an account appear to have been made out between the mortgagor and mortgagee within twenty years; Anon. 2 Atk. 333. Edfell v. Buchanan, 2Vez. Jun. 83. Lake v. Thomas, 3Vez. 20.; or even if the mortgagor appear to have treated the estate as in mortgage; for the rule, proceeding on the notion of a dereliction of the pledge, and the difficulty of making up accounts after great length of time, cannot apply to cases where the party in possession of the pledge continues to treat it as subject to redemption; Ord v. Smith, Sel. Ca. Ch. q. Palmer v. Jackson, 5 Bro. P. C. 194. Conway v, Shrimpton, 2 Eq. Ca. Ab. 596. ca. 10. 1 Bro. P. C. 309. Perry v. Marston, 2 Bro. Ch. Rep. 397.; or receive or demand interest; Trash v. White, 3 Bro. Ch. Rep. 289.; or consents that the mortgage should be redeemed; Proctor v. Oates, 2 Atk. 140. Still less does the rule apply, where the mortgagor continues in possession even of a part of the mortgaged premises; Rakestraw v. Brewer, Sel. Ca. Ch. 55. It may be proper in this place

ture of a Welch mortgage, and in fuch case, the length of time is no objection (4).

(4) Orde v. Hemming, 1Vern. 418.

place to advert to the St. 4 & 5 W. & M. c. 16., which takes from a mortgagor the right of redemption, if he afterwards mortgage the fame premifes without communicating by notice in writing the prior incumbrance to the subsequent mortgagee; see Stafford v. Selby, 2 Vern. 589.; in which case several points are determined upon the construction of this statute,

SECTION VIII.

AND this court cannot shorten the time of redemption which the parties have agreed upon (p), but when that is past,

(p) The right of redemption is not confined to the mortgagor, his heirs, executors, affignees, or subsequent incumbrances; but extends to all persons claiming any interest whatever in the premises, as against the mortgagor; therefore a person claiming under a deed, void (as being voluntary) against a subsequent mortgagee, may redeem, for the deed though void as to the mortgagee, is binding on the mortgagor; Rand v. Carthwright, I Ch. Ca. 59. I Vern. 193.; à fortiori

(1) Bonham v. Newcomb, 2Ventr. 364. past, (q), the practice is to foreclose (1). Yet at the common law, in the case of infants, the parol was to demur, and the infant is not bound to answer till full age, and the register, parliament, and common law give no execution against the infant heir, though the debt were clear and in-

fortiori may any person who has acquired for valuable consideration, an interest in the land, as a tenant under the mortgagor; Keech v. Hall, Doug. Rep. 21, 22.; or a judgment-creditor; having previously sued out a writ of execution; King v. Marrissal, cited in Shirley v. Watts, 3 Atk. 200.; or a tenant by elegit, statute merchant or staple, or tenant by the curtesy or in dower; Jones v. Meredith, Bunb. 346.; or a jointress; Howard v. Harris, I Vern. 33.; the crown may also redeem estates mortgaged and afterwards forseited by the treason, &c. of the mortgagor; Attorney General v. Crosts, 1 Bro. P. C. 222.

(q) The mortgagee may not only institute his suit in equity to foreclose, but may at the same time, if out of possession, (except under particular circumstances,) bring an ejectment at law to obtain the possession, Booth v. Booth, 2 Atk. 343.; or if the personal estate be deficient, and the heir and personal representative of the mortgagor be the same person, he may pray a sale of the mortgaged premises in the first instance. Daniel v. Skipwith, 2 Bro. Ch. Rep. 155.

disputable,

disputable, as by a judgment or statute; but the contrary is done in chancery (2). However, in equity, the interest of infants is fo far regarded and taken care of, that no decree shall be made against an infant (r) without having a day given him to flew cause after he comes of age (3). And there being an infant in the case, we cannot foreclose him without a day to shew cause (s) after he comes of age. But the proper way in such a case, is to decree the lands to be fold to pay the debts, and that will bind the infant (4). So if lands are devised to be fold for payment of debts, the lands may be decreed to be fold, without giving the heir, who is an infant, a day to fhew cause, when he comes

(2) Anon. 2 Ch. Ca. 164.

(3) Lord Falkland v. Bertie, 2Vern. 342-

(4) Booth v. Rich, 1 Vern. 295. Bennett v. Edwards, 2 Vern. 392.

- (r) This protection is peculiar to the disability of infancy; for a seme covert may be foreclosed, and shall have no day given to her or her heirs to shew cause after the coverture is determined; Mallack v. Galton, 3 P. Wms. 352.; unless there be some fraud or collusion: as to cases in which equity will open the foreclosure, see Powell on Mortgages, 448.
- (s) The only cause, however, which he is then allowed to shew, is error in the decree; for he is permitted neither to redeem, nor to ravel into the accounts; Mallack v. Galton, 3 P. Wms. 352. Lyne v. Willis, Rolls, 13 May 1730.

(5) Cooke v. Parfons, 2 Vern. 429. Pre. Ch. 185.

(6) Leving v. Caverley, 1 Eq. Ca. Ab. 281. c. 5.

(7) Cecil v. Salisbury, 2Vern. 224.

(8) Whitchurch v. Whitchurch, g Mod. 128.

of age; for nothing descends to him. But if he is decreed to join in the fale, he must have a day after he comes of age (5). But although if an infant answer by guardian, upon which a decree is made, without any day given him to shew cause, it shall not be read or admitted as evidence against him, when he comes of age (6); yet an infant shall be bound by an offer made by him in his answer, if the other fide are thereby delayed, and he do not immediately after his coming of age apply to the court, in order to retract his offer and amend his answer (7). And fome fay, there is fcarce any cafe where an infant hath time to shew cause against a decree, but where it is necessary for him to join in a conveyance, as in case of foreclosure or the like (8).

SECTION IX.

BY the civil law, the mortgage is properly a fecurity only for the debt itfelf, for which it was given, and the confequences of it, as the principal fum and interest, and the costs and damages laid out in preferving it (t). But he that will have equity to help, where the law cannot, shall do equity to the party against whom he feeks to be relieved (1). And upon this rule a mortgage, given as a counter-fecurity to a joint obligor, shall fland as a fecurity for a fecond joint bond, entered into by the same person afterwards, without any agreement for that purpose; and the heir shall not redeem without faving harmless against both (2). (2) St. John v. Holford, 1 Ch. So if the mortgagor borrows money of Ca. 97. the mortgagee, and gives bond for it, the heir of the mortgagor shall not redeem (u) without

(1) Francis' Maxims,

⁽t) See Dig. lib. 13. tit. 7. f. 8. De Pigneratitia Actione.

⁽u) But though the heir cannot himself redeem, without discharging both the mortgage and bond, yet if the heir affign the equity of redemption, his affignee

(3) Shuttleworth v. Laywick, 1 Vern. Windham v. Jennings, # Ch. Rep. 128. Coleman v. Wynch, 1 P.Wms. 775. Powis v. Corbett, 3 Atk. 556. Troughton v. Troughton, 1 Vez. 87.

without also paying the debt by bond, if that the mortgagor bound himself and his heirs in the bond (3); for it is a known rule in equity, that where there is an estate fubfifting at law, equity will not destroy it, unless the party redeeming will fatisfy all equitable demands out of the estate (x). And the law is the same of an executor, in case of a mortgage of a lease for years, though no special agreement, that the

may redeem, upon payment of the mortgage only; Coleman v. Winch, 1 P. Wm. 775. Bayly v. Robson, Pre. Ch. 89.; as may also subsequent incumbrancers, Morrett v. Paske, 2 Atk. 54. Nor shall the mortgagee be permitted to tack his bond even against specialty creditors. Lowthian v. Hazel, 3 Bro. Ch. Rep. 162. For, as observed by Lord Thurlow in the above case, "the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuity of fuits, it is folely matter of arrangement; for, in natural justice, the right has no foundation." See also Heams v. Bance, 3 Atk. 630.

(x) And, therefore, if there be two mortgages, and one be defective, the court will not fuffer one to be redeemed without the other. Purefoy v. Purefoy, IVern. 29. Shuttleworth v. Laywick, I Vern. 245. Mergrave v. Le Hooke, 2 Vern. 207. Pope v. Onflow, 2 Vern. 286. Ex parte Carter, Amb. Reports, 733. Roe v. Soley, 2 Bla. Rep. 726. But fee ex parte King, 1 Atk. 300.

bond

bond debt should stand secured by the mortgage (4). So of the mortgagor himfelf, he must pay all that was due on note, or fimple contracts, or bonds (5). this last point has been denied by some, and a diverfity taken between the mortgagor himself and his heir (6); for the land in the hands of the heir is chargeable with the bond debt even at law. And fince the statute against fraudulent devifes (7), the devifee of the equity of redemption is in the same case with the heir (y); because the statute makes such devise void, as against creditors (8); but, before that statute, such devisee would not be liable to the bond debt (9).

(4) Anon. 2Vern. 177.

(5) Baxter v. Manning, 1 Vern. 244.

(6) 1 Eq. Ca.
Ab 325.
note (a).

(7) 3W. & M. c. 14.

(8) Challis v.
Cafborn, 1 Eq.
Ca. Ab. 325.
c. 9.
(9) Baily v. Robinfon, 1 Eq.
Ca. Ab. 325.
note (b).

(y) Unless the devise be in trust for the payment of debts. Heams v. Bance, 3 Atk. 630.

SECTION X.

A S for pawns, they differ in this respect from mortgages, as appears by the following case: A. pawned some jewels to K., who figned a writing, that they were to be redeemed in twelve months, otherwife they were to be as bought and fold. K., within a short time after, delivers over the jewels, together with some plate of his own, to M., as a pledge for 2001.; and K. afterwards borrowed 301. and 501. of M., on promissory notes, to be repaid on demand. Although M. was a bookfeller, and did not deal in plate or jewels, and fo had not gained any property, as having bought in a market ouvert, yet it is natural to think, although he took notes for the 30%, and 50%, that the pawn was not to be parted with until that money, as well as what was before lent, was paid. And it is to be looked upon as an account current between K. and M., and therefore he might retain what he had in his hands, until the balance was paid; but the goods of K., which

ne

fur

which were pawned first, are to be first applied, as far as the value thereof would extend (z) (1).

(1) Demainbray v. Metcalf,

2Vern. 698. Pre. Ch. 420. Gilb. Rep. 104. Ex parte Deeze, 1 Atk. 229. Ex parte Ox-enden, 1 Atk. 236. See Jones v. Smith, 2Vez. Jun. 278.

(z) As to some other points of difference, see Puff. b. 5. c. 10.

SECTION XI.

BUT in this both pawns and mortgages agree, that the act, for which the defendant is to pray equity against the plaintiff, must be done to the plaintiff himself, or to his representative; for if the mortgagor mortgage the equity of redemption (a), and the second mortgagee brings a bill to redeem, he shall not be

(a) Otherwise, if the mortgagor borrow more money of the mortgagee, and agree, that such further sums shall be secured on the mortgaged premises. Matthews v. Cartwright, 2 Atk. 347. As to buying in old securities to protect the title of a mortgagee, see B. 3. c. 3.

n

1-

(1) Brereton v. Jones, 1 Eq. Ca. Ab. 325.

(2) Brereton v. Jones, 1 Eq. Ca. Ab. 325.

(3) Bromley v. Hammond, 2 Ch. Ca. 23.

obliged to pay the bond debt, fince the money was not lent to him (1). So the affignee of the equity of redemption shall not be affected by a judgment, after confessed by the mortgagor, though the judgment-creditor purchase in the mortgage, but shall redeem, upon payment of the first mortgage money only (2). So if tenant for life, remainder to his son in tail, mortgage the lands, and the son after borrow money of the mortgagee, and give the lands as a security, yet he may redeem without paying his father's mortgage; for the son is a stranger to the sather, and all one as stranger (3).

SECTION XII.

BUT, further, the mortgagee is to be confidered as a creditor beyond the fecurity he has taken (b). As, where A, lent

(b) If mortgagee, after decree of foreclofure, though figned and inrolled, proceed at law against the mortgagor

II.

le

ne Il

n-

g-

e,

ne

eil,

er

pt

ay

rt-

a-

be

he

A,

ent

ugh

ortigor

lent a fum of money on the mortgage of fome houses, and had a bond for payment of the money, as usual in such cases; afterwards, he lent a fum of 2000/. on the equity of redemption, and had a bond for that likewise; and then the mortgagor becomes a bankrupt; and, by fome accident, the value of the houses sunk so much, that they were not sufficient to raise the mortgage money first lent, on a bill brought to have them fold; and that, as to fo much as they fell short to answer the first mortgage money, the mortgagee might come in upon his bond as a creditor, it must be so decreed; and as to the 2000l. lent upon the equity, which was worth nothing, it must stand fingly upon the bond (1). So where a man borrows on the mortgage of a ship, and covenants to repay the infurance money, but there was

(1) Wiseman v. Carbonnell, 1 Eq. Ca. Ab. 312. C. 9.

gagor upon any collateral fecurity, such proceedings will open the foreclosure. Dashwood v. Blythway, 1 Eq. Ca. Ab. 317, c. 3. But, quære, Whether, if the mortgagee after foreclosure has fold the pledge, and his debt not satisfied, equity will restrain him from proceeding on the bond? See Tooke v. Hartley, 2 Bro. Ch. Rep. 125. The safer course is for the mortgagee to pray a sale—but note, he cannot pray a sale without previously praying a foreclosure.

no covenant for repayment of the princi-

pal money itself (c), the mortgagee treated with a person concerning the insurance, but could not agree for the rate, and thereupon the ship went out, and was lost in the voyage; since, if he had taken no security at all for his money, he had then without question been a creditor by simple contract, surely the taking security ought not to put him in a worse condition, especially now the security being lost (2). And in case of pawns, even at the common law, if the pawn is lost without the default of the pawnee, he may have an action for his money against the pawn-or (3).

(2) Cited in King v. King, 3 P.Wms. 360.

(3) 2 Salk. 523.

(c) Every loan creates a debt from the borrower, whether there be a bond or covenant for payment or not. Howel v. Price, 1 P. Wms. 291. Balsh v. Hyham, 2 P. Wms. 453. So if the personal debt be also secured by mortgage, see Howel v. Price, 1 P. Wms. 291., and the cases cited in Mr. Cox's note(1), 5th ed. Meynell v. Howard, Pre. Ch. 61.

SECTION XIII.

YET notwithstanding that, by the common law, the mortgagee of lands has an absolute interest, and by the covenant for quiet enjoyment, &c. till default of payment, the mortgager is but tenant at will to the mortgagee (d); in natural justice and equity, the principal right of the mortgagee is to the mortgage money (e), and his right to the land is only

(d) But the mortgagee cannot intitle himself to rents and profits received by the mortgagor whilst he was permitted to retain possession, Coleman v. D. of St. Albans, 3 Vez. 25:

(e) The reasoning of Lord Keeper Finch upon this point, in the above case of Thornborough v. Baker, is so clear and satisfactory, that I cannot refrain from transcribing it, "By the common law, if the conditions or deseazance of a mortgage of inheritance be so penned, that no mention is made either of heirs or executors to whom the money should be paid, in that case the money ought to be paid to the executor, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the deseazance appoints the money to be paid either

as

(1) Thornborough v. Baker, 1 Ch. Ca. 283. Co. Litt. 209. b. 210.

as a collateral fecurity for the payment of it (1). And, therefore, all mortgages

to heirs or executors disjunctively, there, by the law, if the mortgagor paid the money precifely at the day, he may elect to pay it either to the heirs or executors, as he pleafeth. But where the precise day is past, and the mortgage forfeited, all election is gone in law; for in law there is no redemption. when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heir or executors of the mortgagee, at the election of the mortgagor; for it were against equity to revive that election; for then the mortgagor might defer the payment as long as he pleafeth, and, at last, compound for payment of the money to that hand which will use him best; much less can the court elect or direct the payment as they please, for a power so arbitrary might be attended with many inconveniences throughout. Therefore, to have a certain rule in those cases, a better cannot be chosen, than to come as near unto the rule and reason of the common law as may be. Now the law always gives the money to the executor, where no person is named; and where the election to pay to either heir or executor is gone and forfeited in law, it is all one in equity as if neither heir or executor were named; and then equity ought to follow the law, and give it to the executor; for, in natural justice and equity, the principal right of the mortgagee is to the money, and his right to the land is only as a fecurity for the money. Wherefore, when the fecurity descends to the heir of the mortgagee, attended with an equity of redemption, as foon

ges (e) are to be looked upon as part of the personal estate, unless the mortgagee, in

as the mortgagor pays the money, the lands belong to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors or administrators of the mortgagee. And, for this reafon, a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divided according to custom. And though it may feem hard that the heir should part with the land, and be decreed to make a recompence, without having the money which comes in lieu of the land, yet it will not feem fo to them who confider, that the land was never more than a fecurity, and that, after payment of the money, the land is in trust for the mortgagor, which the heir of the mortgagee is bound to execute; and his Lordship declared, that the right to a fum of money, which is a personal duty, ought always to be certain, and not to be variable upon circumstances. Wherefore, his Lordship did not think it material that the administrator in this case had affets without this money; for affets, or not affets, is not the measure of justice to executor or administrator, but ferves only as a pretence to favour the heir, who either ought to have the money, if there be no affets, or not to have it, though there be affets. And, for the fame reason, his Lordship did not think it material, that there wanted the circumstance of a personal covenant from the mortgagor to pay the money; for that, though the case of the administrator of the mortgagee had been stronger with it, yet it is strong enough without it. His Lordship declared, that he had confidered

in his life-time, or by his last will, do otherwise declare or dispose of the same (f). And in regard the money came first out of the personal estate, the law always gives the money to the executor, where no person is named (g).

And

fidered the various precedents in this case which had been urged, whereof one did not come to the very point, there being a great difference between a mortgage and an absolute conveyance, with a collateral agreement to reconvey upon repayment of the purchase money; the other late precedents which made for the heir being contrary to the more ancient precedents of this court; and to some modern precedents also, which seemed to his Lordship of more weight, his Lordship being of opinion, that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee, in his life-time, or by his last will, do otherwise declare and dispose of the same."

- (e) Nor will the mortgage being in fee vary the rule. Winn v. Littleton, 2 Ch. Ca. 52. 2Vent. 351.

 v. Hicks, I Vern. 412. Turner's Case, 2Vent. 348.
- (f) That he may otherwise declare by his will, see Noyes v. Mordaunt, Gilb. Rep. 2. 2 Vern. 581.
 - (g) If the heir be named, that payment to him before

And where the election to pay, either to the heir or executor, is gone and forfeited in law, it is all one in equity, as if neither heir or executor were named: and, therefore, to have a certain rule in these cases, equity ought to follow the law, and give it to the executor; and the right to a fum of money, which is a perfonal duty, ought always to be certain, and not variable upon circumstances; fo that whether there are affets or not (b), or there wanted the circumstances of a personal covenant to pay the money, is not material. So although the mortgage be foreclosed, or if it be of fo ancient a date, as, in the ordinary course of the court, not redeemable; yet, in case the mortgagee be not actually in possession (i), it shall be looked upon in his

fore forfeiture would be good. See Noy v. Ellis, 2 Ch. Ca. 220.

⁽h) See Ellis v. Greaves, 2 Ch. Ca. 50.

⁽i) It appears from Fisk v. Fisk, Pre. Ch. 11., that if a mortgage in fee descend on the heir, and he buy in the equity of redemption, and there be no desect of assets, that he shall not be deprived of his advantage.

(2) Awdly v. Awdly, 2 Vern. 193. his hands to be personal estate (2). But if the land be worth more than the money, the heir may well say, I will pay you the money, and take the benefit of the foreclosure to myself (3).

(3) Clerkfon v. Bowyer, 2 Vera. 67.

Q. If he could have compelled the executor to take the money before he had foreclosed.

CHAP. II.

Of Marshalling the Assets.

SECTION I.

ND although the money shall not be paid to the heir or affignee of the land, without naming him in the condition (1), yet the money may be paid by (1) 1 Inft. 209. them in preservation of their inheritance. et qui sentit onus sentire debet et commodum. And it is equity that should make fatisfaction, which received the benefit (2). As where the heir is indebted by mortgage made by his father, or by bond (3), or by other means, as heir to his ancestor, the personal estate in the hands of the executor shall be compelled to pay that debt (a)

(2) Francis's Maxims, Max. 4.

(3) Armitage v. Met alfe, 1 Ch. Ca. 74.

(a) Unless the testator, by express words, exempt, or otherwife clearly manifest his intention to exempt the personal estate. Hall v. Brooker, Gilb. Rep. 72. Walker v. Jackson, 2 Atk. 624. Bamfield v. Wyndham, Pre. Ch. 101. Wainwright v. Bendlowes, 2 Vern. 748. Stapleton v. Colvill, Forrest. 202. Le-

man

in

(4) Cope v. Cope 2Saik. 449, 450-Howell v. Price, 1 P. Wms. 291. Gower v. Mead, Pre. Ch. 2. and cafes cited note (a). in ease of the heir (4); and especially in case there be sufficient to pay the debt by the mortgage, &c. and the legacy out of the personal estate; for when both can be satisfied, both shall be satisfied. The reason is, because the personal estate is the sund for the payment of all

man v. Newnham, I Vez. 51. Duke of Ancaster v. Meyer, I Bro. C. R. 454. Burton v. Knowlton, 3 Vez. 107. Brummell v. Prothero, 3 Vez. 111. But the testator devising all his real estate, subject to payment of debts, will not alone be fufficient to exempt the personal estate; Fereyes v. Robertson, Bunb. 301. Bridgman v. Dove. 3 Atk. 202. Haslewood v. Pope, 3 P. Wms. 322. French v. Chichester, 2 Eq. Ca. Ab. 493. c. 5. 1 Bro. P. C. 192. Lord Inchiquin v. Lord O'Brian, I Wilf. 82. Ambl. 33. Samwell v. Wake, 1 Bro. Ch. Rep. 144. Morrow v. Bush. 27th July, 1785. Duke of Ancaster v. Meyer, I Bro, 454. Read v. Lichfield, 3 Vez. 477. Webb v. Jones, 2 Bro. Ch. Rep. 60.; but it has been held, that if the real estate be directed to be fold for the payment of debts, and the perfonal bequeathed to a legatee, that the personal estate shall not be applied in ease of the real, Wainwright v. Bendlowes, 2 Vern. 718. Gilb. Rep. 125. Pre. Ch. 451. Bamfield v. Wyndham, Pre. Ch. 101.; but this rule does not apply where the personal estate is not expressly bequeathed, see Gray v. Minnethorpe, 3 Vez. 103. That parol evidence is admissible, to shew that executrix legatee should have his personal estate exempt from his debts, see Gainsborough v. Gainsborough, 2 Vern. 252.

debt,

debts (b), and the mortgage money is a debt, whether there be a covenant for payment in the mortgage deed or not (5); though some have been of a contrary opinion, where there is no covenant express

(5) Cope v. Cope 2 Salk. 449. Meynell v. Howard, Pre. Ch. 61. Floyer v. Livington, 1 P. Wms. 271.

(b) The personal estate is certainly the general fund for the payment of debts; and where the real effate is only collaterally charged, the personal estate is primarily liable; but the rule is otherwife, where the charge is on the real effate principally, and the perfonal fecurity or covenant is only collateral; for, in such case, the landholder enters into fuch covenant relying upon the land enabling him to discharge it, and the money raised does not increase his personal estate, but is to exonerate the rest of the real estate. See Countess of Coventry v. E. of Coventry, 2 P. Wms. 222. Edwards v. Freeman, 2 P. Wms. 437. Wilfon v. E. of Darlington, Rolls, February 1785, in a note, 2 P.Wms. 664. Leman v. Newnham, I Vez. 51. Ward v. Dudley, 2 Bro. Ch. Rep. 316. Lewis v. Nangle, Amb. Duke of Ancaster v. Meyer, I Bro. Ch. Rep. 454. So where the debt, although personal in its creation, was contracted originally by another, as where an estate is bought, subject to a mortgage, the personal estate of the purchaser shall not be applied in exoneration of the real estate; see Tweddell v. Tweddell, 2 Bro. Ch. Rep. 101., unless the purchaser appear to have intended to make the debt his own; fee Pockley v. Pockley, I Vern. 36. Earl of Belvidere v. Roch. fort, 6 Bro. P. C. 520. Billinghurst v. Walker, 2 Bro. Ch. Rep. 608; but a mere covenant for fecuring the debt will not be fufficient for fuch purpose, Evelyn v. Evelyn,

(6) Evelyn v. Evelyn, 2 P.Wms. 664. Bagotv.Oughton 1 P.Wms. 347. Lawfon v. Hudfon, 1 Bro. C. R. 58. press or implied. But the personal estate of the father is not liable to the grand-father's debts, and therefore it shall not go in exoneration of the grandsather's mortgage of the lands descended to the grandson (6), unless the father had been executor to the grandsather, and had converted the assets to his own use.

v. Evelyn, 2 P. Wms. 664. Forrester v. Leigh, Ambl. 171. Earl of Tankerville v. Fawcett, 2 Bro. Ch. Rep. 57. Tweddell v. Tweddell, 2 Bro. Ch. Rep. 152. Billinghurst v. Walker, 2 Bro. Ch. Rep. 604.

SECTION II.

So the wife being a jointress, and having granted a term for years only out of her estate for life, by fine, with her husband for a mortgage, there rests a reversion in her, which naturally attracts the equity of redemption, although the equity of redemption was limited to the husband, and

and his heirs, by the deed of redemption; for that she was no party to it. And the husband having covenanted to pay this money, if there be assets sufficient, it shall be decreed clear to the wise (1); for the husband having had the money, is in equity the debtor (c), and the land is to be considered but as an additional security (2). And so it is if there were no express covenant. But all other debts (d) shall be first paid (3).

(1) Brend v. Brend, 1 Vern.

re were no (2) Pocock v. Lee, 2 Vern. .

604.
(3) Tate v.

Auftin,
1 P. Wms. 264.

Lord Huntingdon's Cafe, 2 Vern. 437.

(c) The general rule is thus qualified by Lord Hardwicke, in Lewis v. Nangle, Ambl. 150. "The general rule is, that where the husband borrows a fum of money for his own use, and the wife joins in a mortgage of her jointure for repayment of it, that her estate shall be a creditor on the husband's for that fum. So it is where there is no fettlement, and the wife mortgages her estate of inheritance to raise money for the husband: but there is no instance where, at the time of fuch mortgage or fecurity made, if, at the same time, a settlement is made, either before or after marriage, that the husband was confidered as answerable to the wife's estate for the money borrowed; that is an exception out of the general rule, otherwise it would be very inconvenient to men that were going to be married, and, nine times in ten, contrary to the intention of the parties." The general right of the wife may also be repelled by evidence, to shew her intention, that her own estate should bear the charge. Clinton v. Hooper, 3 Bro. Ch. Rep. 201.

Vol. II. U (d) It

(d) It is so laid down by Lord Cowper, Ch., in Tate v. Austin; but were the rule strictly so, it should feem to follow, that it could never have been doubted but that where the incumbrance has been paid out of the husband's personal estate the other creditors of the husband might, pro tanto, come upon the wise's real estate, which Lord Hardwicke, in Robinson v. Gec, I Vez. 252., appears to have denied.

SECTION III.

A ND as the heir, in many cases, has the affistance and favour of the court, as to make the personal estate first liable to debts, and to be applied in ease and exoneration of the real estate; so even an bæres factus has had that relief here (1). The reason is, because the bæres factus comes instead of the bæres natus by the will; and it is prefumed to be the intention of the testator, that he should have all the privileges of the bæres natus. And fome fay, that not only he who is bæres factus shall pray the aid of the personal estate, to discharge the real but even an ordinary devisee shall have that benefit

(1) Pockley v. Pockley, 1Vern. 36. Howell v. Price, Pre. Ch. 477. Bartholemew v. May, 1 Atk. 487.

fit (2). But the law seems otherwise (e). For if a man mortgages his land, and then devises it to 7. S. or to A., for life, the remainder in fee to B., there the charge doth pass with such estate, for there appears no intent of the testator. So where the equity of redemption is purchased, the purchaser shall have no aid of the personal estate of the mortgagor, for he has made it his own debt (3). Nor shall (3) 2 Salk. 450. the heir himself after the fale; for the equity that the heir has, is, that the lands may descend clear to the family (4).

(2) Pockley v. Pockley, 1 Vern. 37-

(4) Wood v. Fanwick, Pre. Ch. 206.

(e) Lord Commissioner Rawlinson, in Gower v. Mead, Pre. Ch. 3., is reported to have faid, that there was a diversity betwixt hares facius and a devisee of particular lands; for a devisee of particular lands shall not have the benefit of the personal estate, but hares factus of the whole estate shall. But this distinction has been long fince over-ruled; and the opinion of Lord Nottingham, as flated in Pockly v. Pockly, is now the established law of the court. Galton v. Hancock, 2 Atk. 436. And the devisee of a particular estate shall not only have his devised estate exonerated out of the personal estate, but, if there be another estate expressly devised for payment of debts, and the personal estate be excepted or exhausted, he may also refort to fuch devised estate, and that although the particular estate devised to him be devised subject to the incumbrances thereupon. Serle v. St. Eloy, 2 P.Wms. 385. So if the personal estate be exempt or exhausted,

and

and there be no real estate expressly devised for payment of debts, but there be a descended estate, the devisee of a particular estate shall have such estate exonerated out of the descended estate. Galton v. Hancock, 2 Atk. 430. Manning v. Spooner, 3 Vez. 114. And see Donne v. Lewis, 2 Bro. Ch. Rep. 257. which states the order of affecting assets, and with which the decree is reconciled by the special directions of the will. It may, however, be proper to remark, that the equity, to have the personal estate applied in exoneration of the real, subsists only between the heir or devisee, and the residuary legatee, and not against creditors or even against specific or general legatees, Hamilton v. Worley, 3 Vez. Jun. 65.

SECTION IV.

BUT regularly the personal estate must aid the heir (f), and an implied intent must not, without clear expression, alter the equitable general law (1). As if a man conveys his lands for payment of debts and legacies, and afterwards devises the personal estate, it shall nevertheless go in discharge of the real; because the re-

(f) So alfo the devisee, see f. 3. note (e).

mainder

(1) Lord Grey v. Lady Grey, 1 Ch. Ca. 297. Anon. 2 Ventr. 349. Davis v. Gardiner, 2 P.Wms. 187.

mainder of the lands, after the debts and legacies paid, descends to the heir as heir, and he is not thereby difinherited. And although there be an express devise to the executor, yet that is only after debts and legacies paid, and being no more than the law gave him, is a void devise (2). fortiori, if the devise to the executrix be in the same clause in which she was named executrix; for it not being faid, free and exempt from payment of debts, she must therefore take it as executrix (3). Otherwise, if a man devise lands for payment of 2Vern. 302. debts and legacies, and the overplus to the heir, or to the heir and a stranger, as they call it in Chancery, out and out, there is a difference between charging an estate with payment of debts, and devising an estate to be fold out and out, to pay debts (4); fince, in this case, the intent ap- (4) Wainwright pears to be, that he should take the over- 2Vern. 718. plus as a money legacy only, and that the Gib Lex Pizland should not descend to him as heir at all.

(2) Haslewood v. Pope, 3 P.Wms. 322.

(3) French v. Chichetter, 2 Vern. 568. Cutler v. Coxeter,

v Bindlowes, Feltham's Cafe, 1 Lev. 203. See alfo Doone v. Lewis, 2 Bro Ch. Rep. 264.

SECTION V.

A ND if there be no affets to answer the

the heir (g) shall have no affistance of the

intent of the testator on his legacies,

(1) Anon. 2 Ch. Ca. 4, 5.

personal estate (1); for this would be to overthrow the testator's express intent by an implied one, that the land was to defcend free to the heir, and to take away from a man the disposal of his own property. So if the personal estate were devised to a stranger, and not to the executor; for fuch devise must then be taken as a legacy. So if the devise were of a specific legacy (2), or any certain sum to the executor, for the fame reason. So if he devise all his goods, chattels, and household stuff in such an house to another, and then goes on in these words: All the rest and residue of my personal estate I give and devise to my wife, whom I make

(2) Oneal v. Mead,
1 P. Wms. 692. Middleton,
2 Ch. Rep. 170. Long v. Short,
1 P. Wms. 403. Tipping v. Tipping,
1 P. Wms. 729. Rider v. Vager,
2 P. Wms. 335.

(g) Neither shall a devisee of a mortgaged estate; but, in such case, if the mortgagee resort to the personal estate, a specific or pecuniary legatee shall stand in his room, for so much out of the real estate. Lutkins v. Leigh, Forrest. 53. Ambl. 172. But, quare, Whether this rule extends to a merely residuary legatee?

fole executrix. For though the words, rest and residue of his personal estate, are generally understood, after debts, legacies, and funerals; yet here they are relative to the last antecedent, and pass to his wife, as a specific devise of what he had not before particularly devised (3). Much (3) Adams v. Meyrick, more, if there be an express clause to exempt the personal estate from payment of debts, the will of the testator shall be obferved. And the heir can have no equity, in case of other creditors, to defeat them of their debts; for this, even an express devise to him of the personal estate, could not have done (b).

1 Eq. Ca. Ab. 271. Ca. 13.

(b) And, therefore, equity will always marshal the affets in favour of creditors. See Francis' Maxims. p. 11. note (a). As to marshalling affets in favour of legatees, see f. 7.

SECTION VI.

ON the other fide, it is but reasonable, that as the heir is to have equity, he should do it. And therefore, although regularly, where the parties are in equal degree, the executor or administrator may prefer which of them he thinks fit: yet equality is equity (1), and the court, where they have any foundation to go upon, ufually marshals the assets, so as all parties may have satisfaction; for, Nemo ex alterius detrimento fieri debet locupletior. So if there be a debt owing to the king, the king's debt shall be fatisfied out of the real estate, that the other creditors may be let in to have a fatisfaction of their debts out of the personal affets (i) (2).

(1) Francis'
Maxims,
Max. 3.

(2) Sagittury v. Hode, 1Vern. 455.

(i) From the case referred to, and from Porey v. Marsh, 2 Vern. 182., and Mills v. Eden, 10 Mod. 489. Lanoy v. D. of Athol, 2 Atk. 446, it appears, that the court would formerly control the creditor's right of election to resort to the real or personal sund. The present practice of marshalling being, however, in general sufficiently protective of the equity of other creditors, renders such controlling interference in most cases unnecessary. There are still cases, however, to which the principle of the above decisions might be equitably applied; as in the above case of Mills v. Eden, where

where the election of the wife might have induced irreparable mischief to the creditors of the husband. So where an American subject might resort to a fund conflicted by the act for the confiscation of the property of his debtor, an American loyalist, from which fund his debtor and other creditors are excluded. To cases like these, the above principle appears to me to be applicable; and should it be objected, that it would break in upon the legal right of the party to elect, it is to be recollected, that no right ought to be allowed to be exercised in a manner prejudicial to the rights of others; nam six utere two ut alienum non lædas.

SECTION VII.

BUT equity is remedial only for those who come in upon a good confideration; so that, in case of legacies, there is a difference. For if the legacy be in satisfaction of a debt, or as a provision for younger children, or grandchildren, then equity will marshal the assets, as for a simple contract creditor (k). And the statute

⁽k) This distinction in favour of children and grandchildren, is stated by Chief Baron Gilbert, Lex Prætoria, p. 307. But though it may have had some foundation

statute for settling intestates' estates has made a will for those that die intestate; and therefore the younger children of one dying intestate, shall have the same advantage, as if their shares had been respectively devised to them (1). But otherwise it is, if the legatees were volunteers or

(1) Mill v. Dirren 2 Vern. 309 So faid, but not decreed.

> foundation as to children, see Herne v. Meyrick, Salk. 416. 1 P. Wms. 201., I have not been able to find any authority upon which it can be extended to grandchildren. It is not, however, necessary to consider the existence or foundation of such distinction, it having been long established, that, as against the heir, equity will, in favour of legatees, marshal the real affets descended. Culpepper v. Aston, 2 Ch. Ca. 11. ping v. Tipping, I P.Wms. 730. Lutkins v. Leigh, Forrest. 54. Hanby v. Roberts, Ambl. 128. is now determined, that the same equity prevails against a devisee, if the estate be devised for or subject to the payment of debts. Pope v. Haslewood, 3 P. Wms. 323. Webster v. Alsop, 12th July 1791. Bradford v. Foley, 14th August 1791, stated in a note. Cook, 3 Bro. Ch. Rep. 347. But fuch equity does not extend to a devisee, whose estate is not subjected to payment of debts. Clifton v. Burt, I P. Wms. 678. Forrester v. Leigh, Ambl. 171.; except where the perfonal estate has been applied in exonerating the devised estate of a mortgage, or other real charge upon it, in which case the legatee shall be allowed to come upon the devised estate pro tanto. Lutkins v. Leigh, Forrester, 53. Not so of a bond or other specialty, not immediately charging the land, I P.Wms. 678.

collateral

collateral relations, for whom the testator was not obliged, by the law of nature, to provide, or were provided for in the life of the testator (2). And since the heir is (2) Horne v. not difinherited by the will, the value of 1 P.W os 201. what descends to him must be looked upon as much a defigned provision for him, as an express devise is for the younger children; and therefore he must abate in proportion out of his provision, in the fame manner, as each of the younger children are to abate out of the respective provisions, where there is not sufficient to answer them all, so that the heir must have as much as all the legatees taken together (3). But if there be a bountiful provision for the heir, as where there is as much left in referve for him as is taken out for a provision for all the younger children legatees, in fuch case the legatees shall have their whole legacies.

e

4

١,

it

Is

s.

v.

v. ot

to 8. 1ed in on 1ot

 \mathbf{al}

Mejii k 1 Salk. 416.

(3) Gilb. Les Prætoria, 307.

CHAP. III.

Of buying in old Securities to protest a Title:

SECTION I.

(1) Francis's Maxims, Max. 14. IN aquali jure melior est conditio possidentis. Where equity is equal, the law shall prevail (1), and he that hath only a title in equity shall not prevail against law and equity. As a purchaser (a)

(a) But neither a judgment creditor, nor a creditor by statute, is a purchaser within this rule; and therefore, if a judgment or statute creditor, being the third incumbrancer, buy in the first mortgage, he shall not unite the first mortgage to his judgment or statute, because he did not lend his money on the credit of the land; whereas, if a third mortgagee buy in a statute, which is the first incumbrance, he shall be allowed to unite the statute to the third mortgage; because the land was in his view and contemplation when he lent the money. Brace v. Duchess of Marlborough, 2 P.Wms. 491. Mosely, 50. Morrett v. Paske, 2 Atk. 53. Anon. 2Vez. 662. Brereton v. Jones, 1 Eq. Ca. Ab. 325. c. 10. Hamerton v. Rogers, 1 Vez. Jun. 513. But see Wright v. Pilling, Pre. Ch. 494.

or mortgagee coming in upon a valuable confideration without notice (b), and pur-

(b) The equity of a subsequent mortgagee buying in a prior fecurity, in order to protect fuch subsequent mortgage, is founded not merely on his being a purchaser for valuable consideration, but on his being such without notice of the mefne incumbrances at the time of his purchase. If, therefore, such mortgagee can be affected with either actual or conftructive notice before payment of the purchase money, or execution of the conveyance, he shall not prevail against the mesne in-See B. 2. c. 6. f. 2. note (i). cumbrancer. what shall amount to constructive notice, it were extremely difficult to extract from the cases any general rule upon the subject; it feems, however, to have been held, that every man shall be presumed to have notice of a decree: Wortley v. Birkhead, 2Vez. 571. Sorrel v. Carpenter, 2 P. Wms. 482. But fee Worfley v. Earl of Scarborough, 3 Atk. 392. So of the instrument under which the party with whom he contracts, as executor or truftee, derives his power. Mead v. Lord Orrery, 3 Atk. 238. Drapers Company v. Yardley, 2 Vern. 662. It feems also agreed, that where a purchaser cannot make out a title, but by a deed which leads him to another fact, he shall be prefumed to have notice of fuch fact. Moor v. Bennett, 2 Ch. Ca. 246. Bisco v. Earl of Banbury, 1 Ch. Ca. 291. Bovey v. Smith, I Vern. 149. Mertins v. Jolliffe, Ambl. 311. Taylor v. Stibbert, 2 Vez. Jun. 437. So whatever is fufficient to put a party on an inquiry is good notice in equity. Smith v. Low, 1 Atk. 490. Ferrars v. Cherry, 2 Vern. 384. In what cases notice to the agent, &c. will bind the principal, fee B. 2. c. 6. f. 4.

200

e-

rd

ot

e-

he

e,

to

he

he

h,

a.

3.

r

chasing

(2) Marsh v. Lee, 2Ventr. 337. 1 Ch. Ca. 162. Churchill v. Grove, 1 Ch. Ca. 36. Higgon v. Calamy, 1 Ch. Ca. 149. chasing in a precedent incumbrance (c), it shall protect his estate against any perfon that hath a mortgage subsequent to the first, and before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage (d); for he has both law and equity for him (2). It is true, there have been strong arguments used against the unreasonableness of this practice, and there might likewise be strong reasons brought for the maintaining it; and so it was at first a case very disputable (e); but, being long since settled, the court will not now suffer

- (c) The incumbrance here adverted to must be such as would be available at law; for, if it be deficient in any of the requisites to give it legal essistacy, it shall not prejudice the intermediate incumbrance. See Fothergill v. Kenrick, 2 Vern. 234. Oxwick v. Plumer, 3 Ba. Ab. 644.
 - (d) See 2 Vent. 339. 2 Vez. 574.
- (e) Lord Hardwicke, in his judgment in the case of Wortley v. Birkhead, observes, "as to the equity of this court, that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then being puisne taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established

in

fuffer that point to be stirred (3); but, it may be, they will, where they find a man designing a fraud, and who thinks to make a trade of cozening by the rules of the court (4). So though it were purchased pendente lite between them, for a discovery and reconveyance, the first mortgage being satisfied (5): but otherwise, if after a de-

(3) Edmunds v. Povey, 1 Vern. 187.
Brae v. Duchefs of Marlborough, 2 P. Wms. 492.

(4) Edmunds v. Povey, 1Vern. 187.

(5) Hawkins v. Taylor, 2 Vern.

in general, and was fo in Marsh v. Lee, by a very solemn determination by Lord Hale, who gave it the term of the creditors Tabula in Naufragio; that is the leading case. Perhaps it might be going a good way at first, but it has been followed ever fince, and, I believe, was rightly fettled; but rightly fettled only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and, therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title, and equity of one fide, this court never thought fit, that, by reafon of a prior equity against a man who had a legal title, that man should be hurt, and this by reason of that force this court necessarily and rightly allows to the common law, and to legal titles; but if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule qui prior est tempore potior est jure must hold."

n

 \mathfrak{d}

of

n

rst

on

ed

in

(6) Snelling v. Squib, 2 Ch. Ca. 48. Earl of Briftol v. Hungerford, 2 Vern. 525. Wortley v. Birk head, 2 Vez. 571. (7) Marsh v. Lee, 1 Ch. Ca. s 66. Stanton v. Sadler, 2 Vern. 30. (8) Hirchcock v. Sedgwick, 2 Vera. 158, 159. Sir John Fagg's Cafe, cited 2 Vern. 52, 53. (9) Higgon v. Calamy, 1 Ch. Ca. 149.

(10) Earl of Huntingdon v. Greenvill, 1 Vern. 52.

cree made (6). So though nothing be due upon it (7), or it be obtained by undue means, as without any confideration, or by fraud (8; for the practice is not material to secure a just debt. So if the purchase were of a precedent statute by the last mortgagee (9), he shall not be brought to any account upon this in equity by the fecond mortgagee, any otherwise than he may do at common law upon a scire fac' ad computand', viz. not according to the true value, but upon the extended value (f) for the whole debt and damages: (10): and this, although the extended value was but a third part of the true value. Same law of a purchaser; and there is no difference whether it was bought in before the purchase or after. So that by protecting is meant, making all the advantages of it (g) that the law admits of.

⁽f) Quare, Whether the mortgagee shall not account for what he hath received, if he hath received enough to satisfy the whole of his demand. See Godfrey v. Watson, 3 Atk. 517. How mortgagee shall account, see Powell on Mortgages, chap. 14.

⁽g) As to the terms of redemption, see B. 3. c. 1. s. 9. note (u)(x).

SECTION II.

SO where the second mortgagee agreed with the executor of the conuzee to put the statute in execution at his cost, and to pay him the debt due on the statute. after such time as the statute should be extended, and an affignment made thereof; for a thing agreed to be done is looked upon in equity as really done; and he shall not only defend himself as to the land that is in his mortgage, but for so much as is contained in the statute (1). But if a man (1) Windham is feifed of fixty acres, and mortgages twenty to A., and then mortgages the whole to C., who purchases in the first mortgage, that shall not protect more than the twenty acres; but it shall protect these twenty acres, so as B. shall never recover that, until he pay C. all the money upon the first and last mortgage (2).

v. Ld. Richardfon, 2 Ch. Ca. 212, 213.

(º) 2 Ventr. 339.

SECTION III.

A ND it is now an established doctrine, that a purchaser bona fide, and without notice of any defect in his title at the time of his purchase, may lawfully buy in any flatute, mortgage, or any other incumbrance; and, if he can defend himself by those at law, his adversary shall have no help in equity to fet those incumbrances afide; for equity will not difarm a purchaser. And precedents of this kind are very ancient and numerous, where the court has refused to give any affistance against the purchaser, either to the heir or to the widow (b), the fatherless, or to the creditors, or to one purchaser against another (i), And this rule in Chancery is in vindication of the common law, where

⁽b) See Williams v. Lambe, 3 Bro. Ch. Rep. 264., in which the widow appears to have been affifted in equity against a purchaser for valuable consideration, without notice.

⁽i) See Burgh v. Francis, Rep. Temp. Finch, 28.

the maxims which refer to descents, discontinuances, non-claims, and collateral warranties are only the wise acts and inventions of the law, to protect and quiet the possession, and strengthen the right of the purchasers (1).

(1) Dudley v. Dudley, Pre. Ch. 249.

BOOK THE FOURTH.

Of Last Wills and Testaments.

PART I.

Of Legacies.

CHAP. I.

How to be tried and expounded.

SECTION I.

IT is not pretended, that wills are of ecclefiaftical conuzance fua natura (a), but only fuch as were made for pious uses;

(a) In England, the right of making a will may be confidered to have existed from the earliest period of our law; for we have no trace or memorial when it did not exist; and we find intestacy referred to in the law before the conquest, and the distribution of the intestate's estate, after payment of the lord's heriot, directed according to the established law. "Sive quis incuria,"

(1) Marriott v. Mairi at, G ib Rep. 205. Stra. 666.

uses (1); and, in England, it plainly appears, that the probate of testaments was originally in the county court. But the Conqueror made a law, that no matters of ecclefiaffical conuzance should be transacted in the county court (b). And although

incuria, five morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum fuarum partem, (præter eam quæ jure debetur hereoti nomine,) fibi affumito. Verum possessiones uxori, liberis et cognatione proximis pro suo cuique jure distribuantur." Leges Canuti, c. 68. 2 Bla. Com. 491.". This circumstance would, of itself, be sufficient to shew, that wills were not anciently with us confidered as being, Juâ naturâ, of ecclefiaffical cognizance; fince, at fuch period, an exclusive ecclesiastical jurisdiction does not appear even to have existed; but this point is rendered incontrovertible by the feveral authorities, which shew, that the probate of wills was anciently in the county courts, in which, until the conquest, the bishop and the sheriff fat together; Lamb. Saxon Laws, 64.; without any fort of distinction between the lay and the ecclefiastical jurisdiction. 3 Bla. Com. 61. See also 4 Burn's Ecclefiastical Law, 187. Linwood, 174. Swinburne, 409., 5th ed. The learned Reader, who wishes to trace the ecclefiaftical jurisdiction in testamentary matters by the rules of the civil and canon laws, will be highly gratified in the perufal of the argument of Lord Chief Baron Gilbert, in the case of Marriott v. Marriott, Gilb. Rep. 203. Stra. 666.

⁽b) This ordinance of William is comprized in a char-

though it is not discovered, how the Bishop and Earl divided their causes and jurisdiction

ter relating to the bishoprick of Lincoln; and thereby he commanded, that no bishop or archdeacon should thenceforward hold plea de legibus episcopalibus in the hundred court, nor fubmit to the judgment of fecular persons, in a cause which related to the cure of souls. But whoever was proceeded against for any cause or offence according to the episcopal law, should refort to fome place which the bishop should appoint, and there answer to the charge, and do what was right towards God and the bishop, not according to the law used in the hundred, but according to the canons and the epifcopal law. " And it was further ordered, that should any one, after three notices, refuse to obey the process of that court, and make submission, he should be excommunicated; and if need were, the assistance of the king and the sheriff might be called in. The king, moreover, strictly charged, that no sheriff prapositus, five minister regis, nor any layman whatsoever, should intromit in any matter of judicature that belonged to the bishop." Wilkin's Leges Angl. Sax. p. 292, 293. This charter may be confidered as the basis of our ecclefiaftical courts; but it referring generally to pleas de legibus episcopalibus, and not defining the several ob. jects of episcopal law, throws little light on the origin of ecclefiastical jurisdiction in matters testamentary, which, as not immediately allied to the spiritual function, do not appear to have been upon the establishment of a purely ecclefiastical court, subjected to an exclusive ecclesiastical jurisdiction. See Hensloe's Case, 9 Rep. 38.; but see Manning v. Napp, Salk. 37., which denies the law of Henfloe's Cafe. But, however difficult

jurisdiction after the said law, yet that of wills, it seems, went wholly to the bishop and

difficult it may be to state the precise period when the ecclefiastical court first acquired or took cognizance of testamentary matters, it seems agreed, that it was known and recognized in the reign of Henry II., and, according to Sir H. Spelman, in the reign of Henry I.; Sir H. Spelman, (Origin of Probate of Wills,) observing, that, in Scotland, the cognizance of wills belonged to the ecclefiastical jurisdiction; and, he adds, doubtless then also in England. Glanville, (lib. 7. c. 6, 7.) having stated, that, in the reign of H. II., the jurisdiction of personal legacies was in the temporal courts, observes, that notwithstanding this, if there was a question in the temporal courts, whether a testament was a true one, or not; whether it was duly made, or whether the thing demanded was really bequeathed, fuch plea was to be heard and determined in the court christian; because all pleas upon testaments are properly cognizable before the ecclefiaftical judge; and the reason why spiritual men have the proving of testaments, is, because it is to be intended that the spiritual men have better conscience than laymen, and that they have more knowledge what is most for the profit of the foul of the testator than laymen have. See Ferkins, § 486. Noel v. Wells, I Lev. 235.; but fee Chichester v. Philips, Raym. 404. But although it be true, that, at present, the spiritual court is the only court that has jurisdiction in the probate of wills, and granting of administration; yet from this general rule must be excepted all courts baron that have had probate of wills time out of mind, and have always continued that usage; such as the Manor of Mansfield, and

and clergy; and the Saxon custom being changed, the Norman was introduced. Nor was the very name of the Ecclefiaftical Court, or Court Christian, heard of before this division. But it is clear, that in H. II.'s time, the jurisdiction of personal legacies was in the fecular courts; and in Glanv. lib. 7. cap. 6 & 7., there is the form of the writ for a personal legacy. Yet that the spiritual court did, from the beginning of H. III., exercise a jurisdiction for recovery of legacies, is infallibly proved from Bracton (2), and the cases of that (3) Bracton, time (c). And though in legacies, as in fol. 61. tithes (3), the jurisdiction that gave the recovery of them was fometimes in one, and fometimes in the other court, before

(3) 2 Inft. 488.

and those of Cowle and Caversham in Oxfordshire, which courts Wentworth fays he himself kept. See Office of Executors, 43. Seld. de Testamentis. Godb. 59. Vaugh. 207. Shaw. 173.

(c) The ecclefiaftical courts having once acquired jurisdiction over the probate of wills, its power to enforce the execution of them appears to have been a reasonable consequence; but we are not warranted, from any authority, to conclude, that fuch enlargement of jurisdiction obtained, at least generally, prior to the reign of H. III. See Seldon's Origin of the Ecclefiastical Jurisdiction of Testaments.

it was restrained to the spiritual only; yet it seems beyond exception, that the spiritual jurisdiction over legacies was long before in practice. The beginning of this practice is as difficult to find, as that of probates: but it is thought by some to have come from the Canon in the Decretals.

SECTION II.

BUT it is without question, that the suit for a personal legacy may be brought in Chancery (d); and, if the matter has proceeded

(d) An executor being in equity confidered as a trustee for the legatee, with respect to his legacy, and as a trustee, in certain cases, for the next of kin, as to the undisposed surplus, is the true ground of equitable jurisdiction, in enforcing the payment of a legacy, or distribution of personal estate. Wind v. Jekyll. I P. Wms. 575. Farringdon v. Knightly, I P. Wms. 544. That the jurisdiction of our courts of equity is, in such cases, more effective and protective of the interest of creditors and legatees, is evident in several instances,

proceeded to a fentence in the ecclefiaftical court, it is proper to come here for the executor's indemnity. And here legatees are to give fecurity to refund, but not there; and this court will fee the money put out for the children (1). And fo a bill for distribution of an intestate's perfonal estate is very proper in this court; for the spiritual court in that case has but a lame jurisdiction, and there are no negative words in the act of parliament (2).

(1) Horrell v. Waldson, 1 Vern. 26.

1 Vern. 133. Pamplin v. Galen, 2 Ch. Ca. 95. Anon. 2 Ventr. 362. 2 Ch. Rep. 167. Howard v. Howard, 1 Vern. 134.

(2) Mitthews v. Newhy,

inflances, particularly in compelling executors to give fecurity for a legacy payable at a future day, the executor appearing to have wasted the estate; Duncombe v. Stint, I Ch. Ca. 121.; or to bring the fund into court, Strange v. Harris, 3 Bro. Ch. Rep. 365. And there are cases in which a court of equity will restrain proceedings in the ecclefiaffical court for a legacy; as where a husband is fuing for a legacy in right of his wife, because the ecclesiastical court cannot enforce the equity of the wife. See Jewson v. Moulson, 2 Atk. 420. Tanfield v. Davenport, Toth. 114. Pre. Ch. 548. Hill v. Turner, 1 Atk. 516. And, for the same reason, an action at law cannot be maintained for a legacy, fee Dicks v. Strutt, 5 Term Rep. 690.

SECTION III.

BUT a will, proved in the spiritual court, is not to be controverted here for fraud (1), although he shall have no aid of this court (2). Yet some think (3) the judgments of the ecclesiastical court ought to be as subject to the equity of this court as judgments in the courts of common law (e). And although at law (4) one executor is not liable to the devastavit of another, yet in the ecclesiastical courts, and by their law, if an executor prove the will, they will charge him, though he in-

(e) In the case of Hill v. Turner, I Atk. 514., Lord Hardwicke, having recognized the jurisdiction of the court in the case at bar, observed, that though the court cannot, on petition, prohibit the ecclesiastical court, yet they will restrain a person who has clandestinely married a ward of the court, from enforcing the sentence of the ecclesiastical court, either against the infant or his guardian; and, in the case of Shessield v. Duke of Buckingham, I Atk. 628., Lord Hardwicke restrained proceedings in the prerogative court, to controvert the validity of a will which had been already determined and acted upon. And see also Barnsley v. Powell, I Vez. 119. 284.

termeddle

(1) Plume v. Beale, 1 P. Wms. 388. Stephenton v. Gardner, 2 P. Wms. 286. Rex v. Vincent, Stra. 481. Bennet v. Vade, 2 Atk. 324. See alfo Noel v. Wells, 1 Lev. 235. (2) Nelson v. Oldfield, 2 Vern. 76. (3) Vanbrough v. Cck, 1 Ch. Ca. 200. (4) Hargthorfe v. Milforth, Cio. Eliz 318.

termeddle no farther (f), to pay the legacies (5). And the plaintiff is without relief by appeal from the sentence; because the judge's delegate must judge according to that law, and therefore this court should relieve him. And, without queftion, there may be fraud in obtaining a will, which is relievable in equity (g), and of which no advantage can be taken at law; as if a man agrees to give the testator 2000l. in bank bills, if he will devise his estate to him; and, upon the delivery of these bills, he makes his will, and leaves his estate to him accordingly, and the bills after prove to be forged or counterfeit (6). But it has been fettled, that a will of a real estate cannot be set aside, in a court of equity, for fraud or imposition, but must be first tried at law, on devisavit vel non, being matter proper for a jury to inquire into (7).

(5) Vanbrough v. Cock, 1 Ch. Ca. 201.

(6) Gofs v.
Tracey,
1 P.Wms. 288.
2 Vern. 700.
Maundy v.
Maundy,
1 Ch. Rep. 66.
Welby v.
Thornagh,
Pre. Ch. 123.
(7) Kerrick
v. Brentby,

3 Bro. P. C. 358. Webb v. Claverden, 2 Atk. 424.

(f) The law here stated is in its principles so harsh, that I much doubt whether it be the law of the eccle-stassical courts; and I am strengthened in my doubt, by not finding any passage in support of it, either in Godolphin or Swinburne.

(g) I have already had occasion to consider the difference of decision upon this point; see B. 1. c. 2. § 3.

SECTION IV.

In regard, therefore, that cases of wills of personal estate are, for the most part, tried in the ecclesiastical courts, and by the rules of the civil and pontifical law, the king's judges must, in such cases, judge after the law of the church, that there may be a conformity of laws (b).

And

(b) The cases referred to in the margin (1) are direct authorities in support of our author's proposition. It feems, however, to be questioned by the Master of the Rolls, in the cafe of Cray v. Willis, 2 P. Wms. 530, his Honor being reported to have faid, "I do not fee that a court of equity should, even in case of a legacy, judge according to the civil law, but ought rather to purfue the common law, which is the general law of the land; for all legatees are volunteers, and ought to stand or fall by the rules of the common law; and that this court does, in other cases, determine the right of legacies according to the rules of the common, and not of the civil, law, is plain from a common case; as suppose a devise to a daughter of 1000l., on condition that the marry with her mother's confent, with a devife over in case the does not marry with such confent; if the daughter does marry without her mother's confent, a court of equity determines the devise over, and the condition to be good, though the civil

And thus, in personal chattels, the civil and canon law is to be confidered (1). And there the rule is, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not a devise of the things themselves; and fo a remainder over of them is good (2). And although, in some cases, a man is faid to die without issue, whenever there is a failure of iffue, as to the limitation over of lands of inheritance (i); yet

(1) Twaites v. Smith, 1 P. Wms. 12. Portman v. Willis, Cro. Eliz. 387. 267.

(6) Hyde v. Parrott, 1 P. Wms. 1. Clarges v. Albermarle, 2 Vern. 245. Vachel v. Vachel, 1 Ch. 1n Ca. 129, 130.

law fays they are both void; for, by that law, maritagium debet effe liberum."

(i) It is certainly true, that, with respect to executory devises of terms for years, courts of equity have much inclined to lay hold of any words in the will, to tie up the generality of the expression of dying without iffue, and to confine it to dying without iffue living at the time of the person's death; but they have not allowed this inclination to prevail, without fome restrictive circumstance in the limitation. See Burford v. Lee, 2 Freeman, 210. Green v. Rod, Fitzgibbon, Beauclerk v. Dormer, 2 Atk. 308. Saltern v. Saltern, 2 Atk. 376. Bigge v. Benfby, 1 Bro. Ch. R. 187. But, "although in the limitation of a personal estate, after dying without issue, these words shall not, ex vi termini, and without the concurrence of any other circumstance of intention, fignify a dying without issue then living, even though the limitation is in the nature

in case of a personal legacy, or chattel real, it is not intended to arise upon any remoter

nature of an estate tail by implication only: yet on the other hand they shall not, ex vi termini, when there is any other circumstance of intention, import an indesinite failure of iffue, even though the limitation is in the nature of an express estate tail; but that, in either case, if the limitation rests solely upon the usual extent and import of these words, the limitation over is too remote, and therefore void, and the whole vests in the first devisee or legatee; but that, in either case, the fignification of these words may be confined to a dying without iffue then living, by any claufe or circumflance in the will which indicate or imply fuch intention." See Fearne's Ex. Dev. 371, 372. Nor are the cases referred to, when examined, at variance with this position; for, in the first, Target v. Gaunt, IWms. 432., the bequest was to A. for life, and no longer, and, after his decease, to such of A.'s iffue as A. should by will appoint; and in case A. should die without issue, then he devised the lands over. These words were, upon the whole of the will, conftrued to mean, iffue living at his death; because it was to be intended, such iffue as A. should or might appoint the term to, viz. iffue then living. With respect to the case of Atkinfon v. Hutchinson, Mr. Fearne observes, "that though Lord Talbot feemed to admit the distinction, yet it was only by way of auxiliary argument; and he by no means appears to have founded his opinion or decree in the case upon it, nor indeed was there any call for it; for the words there were, without iffue; and, in regard to which words, Lord Talbot observed, the case of Forth v. Chapman was in point, as there

ft,

be

to

th

remoter contingency, than that of dying without iffue living at his death (3). So where there was a devise of all the personal estate to A., who was a seme covert; but the testator declared, that it was his mind, that the interest and produce thereof should be for her use, separate from her husband, and, after her decease, the interest and produce thereof to her children till twenty-one, and then the principal to them; but, for want of fuch iffue, then he gave all his estate to the children of 7. S., and made the faid A. executrix and refiduary legatee, she being only entitled to the interest and produce for her life, the personal estate was not vested in her:

(3) Target v. Gaunt, i. P.Wms. 432: Atkinfon v. Hutchinfon, 3 P.Wms. 258. Pinbury v. Elkin i. P.Wms. 563.

could be no difference between the words, without leaving iffue, and leaving no iffue. And it is further observable, that, in Atkinson v. Hutchinson, there was a preceding limitation upon the death of any of the children, without leaving iffue, to the survivors. Now this strictly was not applicable to an indefinite failure of iffue, because confined to a survivor; and it was but reasonable to give the same words the same construction in the subsequent limitation, which they must bear in a limitation immediately preceding, applied to the same subject." Fearne's Ex. Dev. 367, 368. And, in the case of Pinbury v. Elkin, 1 P.Wms. 563. the limitation was, that if A. die without issue by the Vol. II.

her; and the limitation over upon the contingency of A. dying without iffue, is a good limitation; and as for the words refiduary legatee, it only means for the purpose in the will.

testator, then, after her decease, 80% should remain to the testator's brother, the words then after being taken to mean, immediately after, and consequently to restrain the dying without issue to the time of her death.

SECTION V.

A N D the canonists, whom our resolutions have followed, have expounded these wills, as the civilians did the testamenta militaria, according to the intent (k). And, therefore, although a le-

(k) It might be inferred from this paffage, that the testamentum militare was the only will which, by the civil law, was construed according to the intent; a distinction which certainly could not be supported; for, though the testamentum militare was one of the privileged descriptions of wills, its privileges were merely dispensations, with certain solemnities essential to the validity of other wills. See Inst. lib. 2. tit. 11. Vinnius in Inst. p. 309. Godolphin's Orphan's legacy, p. 16.

gacy is to be taken as a gift, yet a man shall be intended to be just before he is kind; fo that a bequest of the same sum by the debtor to the creditor shall be applied in fatisfaction of the debt (1). For, by the law of nature, when two duties happen to interfere at the fame point of time, that which is the most honest and best is to be preferred. And so it shall be in construction; for the intendment of law is agreeable to nature, and on the better fide. Yet where there are affets, and he intended both, it may be as good equity to confirue him both just and kind (1); and the construction of making a gift

(1) Talbot v D.
of Shrewfbury,
Pre. Ch. 394Jeffs v. Wood,
2 P. Wms. 130.
Fowler v.
Fowler,
3 P. Wms. 354.
Reech v.
Kennegal,
1Vez. 123.
Gibson v.
Scudamore,
Mosely, Rep. 7

(1) And fuch is the general inclination of our courts of equity; if, therefore, the testator appear, from any expression in his will, to have intended to be bountiful as well as just, his purpose shall prevail, and the general rule that a legacy, equal or greater than the debt, shall be prefumed to have been intended as a fatisfaction of the debt, must as a mere presumption give way to the express or clear intimation of a different intent; as where the testator creates a fund for the payment of debts, and subject thereto charges his legacies thereon, Chancey's Case, I P.Wms. 408.; Richardson v. Greese, 3 Atk. 65.; Hinchliffe v. Hinchliffe, 3 Vez. 529. That a legacy of a less sum than the actual debt shall not be construed a satisfaction pro tanto, fee Eastwood v. Vincke, 2 P.Wms. 616. But it has Y 2

he

ci-

if-

or,

vi-

ely

the

in-

cy,

cy

(2) Cuthbert v. Peacock,
1 Salk. 155.
Chauncey's Cafe
1 P. Wms. 410.
Rolls.

a gift a satisfaction has in many cases been carried too far (2). And this presumption

Eastwood v. Vincke, 2 P.Wms. 616. Tanner v. Soles, MSS. July, 1789,

been held, that a legacy of a less sum than a portion or provision secured to a child by a settlement or otherwife, is a fatisfaction pro tanto, fee Warren v. Warren, I Bro. Ch. Rep. 305.; but, quare, whether that determination did not proceed upon its being clear of doubt in that case, that the father had forgotten the settlement, fee Hanbury v. Hanbury, 2 Bro. Ch. Rep. 352. It may however be proper to remark that Mr. Sanders, in a note to Bellasis v. Uthwaite, I Atk. 426., treats it as a fettled point, that a legacy not fo great as the portion or provision secured to a child, by a settlement or otherwife, is a fatisfaction pro tanto, and has referred to feveral cases; but which, with the exception of the above case of Warren v. Warren, appear to me to fall rather under the head of double portions or revocation of legacies, than of fatisfaction pro tanto; but in Chaplin v. Chaplin, 3 P.Wms. 246. there certainly is a dictum to But whatever doubt may be entertained upon the point, whether a part fatisfaction shall be intended, yet a part performance of a covenant may be prefumed; as where A. covenants to fettle land of a certain value, and purchases land of less value, which he allows to descend, such purchase shall be inferred to have been in part performance of his covenant, Lechmere v. Lord Carlifle, 3 P. Wms. 211. Wilson v. Pigott, 2 Vez. Jun. 356. As to the performance of covenants by a devolution of interest more beneficial to the covenantee, fee Blandy v. Widmore, I P. Wms. 324.; fee D'Arcanda, 3 Atk. 419.; fee also Kirkman v. Kirkman, 2 Bro. Ch. Rep. 95.; Rickman v. Mortion of the canon law was founded upon the fimilitude of the legacy with the debt, which

gan, 2 Bro. Ch. Rep. 394. and as to the fatisfaction of portions or provisions for children, by a legacy of greater or equal amount, see Hinchlisse v. Hinchlisse, 3 Vez. 516. Sparkes v. Cator, 3 Vez. 530. where the subject is very fully and most ably considered, and where amongst other points it is determined, that slight circumstances of difference which, as between strangers would repel the presumption of satisfaction, are not sufficient as between parent and child, (see also Moulfon v. Moulson, 1 Bro. Ch. Rep. 82.) and that when a legacy has been decreed to be a satisfaction, it must be grounded upon some express evidence, or, at least, strong presumption, that the testator intended it as such.

Having confidered in what cases a legacy shall be esteemed as a satisfaction of an actual debt, due from, or of a covenant entered into by the testator, it may be proper to confider in what cases a devisee or legatee, claiming under and also against the will, shall be put to his election. "A man (Lord Chief Justice De Grey remarks, in his judgment in Pulteney v. Lord Darlington) may give by a mean and indirectly what is not his own, either by express condition or equity arising upon an implied condition." "Where the testator has neglected, probably from ignorance, possibly from inattention to the nature of the effate, to infert fuch a condition, then a court of equity interpofes." If the condition be express "it must be performed as framed, and if it is not, that will induce a forfeiture, but the equity of the court is to fequester the devised interest quoufque, till fatisfaction is made to the difappointed devisee."

a h

d

t,

n of

al

s.

r-

n,

which yet might be controlled by opposite presumption. Much more then ought proofs to do it, which may be stronger than any presumption. So if a legacy be less than the debt, it was never held to go in satisf-

devisee." This being the purpose for which courts of equity interpole, it follows that wherever a testator has, by his will, disposed of the estate of another, to whom he has also, by his will, given other property, whether immediately, or remotely, or contingently, whether of value or not of value, real or personal; the party shall not be permitted to enjoy any benefit under the will, without relinquishing his claim against it, but shall be put to his election; and if fuch devisee or legatee labour under any difability, as infancy or coverture, the court will refer it to a master to inquire, whether it will be most beneficial for the party to take under or against the will, and decree accordingly, fee Noys v. Mordaunt, 2 Vern. 580. Streatfield v. Streatfield, Forrest. 176. Cull v. Showell, Amb. 727. Forrester v. Cotton, Amb. 388. Cookes v. Hellier, IVez. 234. Lewis v. King, 2 Bro. Ch. Rep. 600. Finch v. Finch, 4 Bro. Ch. Rep. 38. Lady Cavan v. Pulteney, 2 Vez. Jun. 544. See also Wilson v. Ld. John Townshend, 2Vez. Jun. 693. in which case the legacy to the wife was to her feparate use, which making her a feme sole in equity was relied upon at bar, as materially diffinguishing it from all the other cases upon the subject, but the court over-ruled the diffinction. A clear knowledge of the funds being requisite to election, no person shall be bound to elect without such previous knowledge, Whistler v. Webster, 2 Vez. Jun. 371.

faction (3). So if the legacy were upon condition, or upon a contingency (m); for the will is intended for his benefit, and therefore it could not be supposed that the testator would give him an uncertain recompence in satisfaction of a certain demand (4). So if the thing were of a different nature, as land, it should not go in satisfaction of money, unless there was a defect of assets (5). So if the debt was contracted after the legacy given (n), he could not have it in contemplation to satisfy a debt not then in being (6). Cases

(3) Cranmer's Cafe, Salk. 508. Talbot v. Earl of Shrewfbury, Pre. Ch. 394. Eastwood v. Vincke, 2 P. Wms. 616. Atkinfon v. Webb, 2 Vern. 478. Minuel v. Sarazine, M fely, 295. (4) Talbot v. Duke of Shrewfbury, Pre. Ch. 394. Cranmer's Cafe, Salk. 508 Nicholls v. Judson, 2 Atk. 300. Crompton v. Sale, 2 P. Wms.

555. Barrett v. Beckford, 1Vez. 519. Spink v. Robins, 2 Atk. 491. Bellass v. Uthwaite, 1 Atk. 426. (5) Eastwood v. Vincke, 2 P. Wms. 616. Crammer's Case. 508. Chaplin v. Chaplin, 3 P.Wms. 245. Stanway v. Styles, 2 Eq. Ca. Ab. Devise, pl. 21. and see 4 Ba. Ab. 369. Gwillim's Ed. (6) Crammer's Case, 2 Salk. 508. Thomas v. Bennett, 2 P. Wms. 342. Chauney's Case, 1 P. Wms. 409. Fowler v. Fowler, 3 P.Wms. 353.

(m) So where the legacy is not equally beneficial with the debt in some one particular, although it may be more so in another, as in time of payment. Atkinson v. Webb, Pre. Ch. 236. 2 Vern. 478. Nicholls v. Judson, 2 Atk. 300. Clark v. Sewell, 3 Atk. 96. Haynes v. Mico, 1 Bro. Ch. Rep. 129. Jeacock v. Falkner, 1 Bro. Ch. Rep. 295. Richardson v. Elphinstone, 2Vez. Jun. 464. or if the debt be sounded on a negociable instrument, Carr v. Eastbrooke, 3 Vez. 563.

)

t

1

(n) So if the debt was upon an open or running account, so that it might not be known to the testator whether he owed any money to the legatee or not. Rawlins v. Powell, I P.Wms. 299.

of this nature, therefore, depend upon circumstances; and where a legacy has been decreed to go in satisfaction of a debt, it must be grounded upon some evidence, or at least a strong presumption, that the testator did so intend it; for a court of equity ought not to hinder a man from disposing of his own as he pleases. And, therefore, the intention (7) of the party is to be the rule; for, where he says he gives a legacy, we cannot contradict him, and say he pays a debt.

(7) Cranmer's Case, Salk. 508

SECTION VI.

BUT, as the whole force of the bequeit (0) often rests upon some particular words, it will be necessary to consider what interpretation they bear in the canon and civil law; at least such as are

made

⁽⁰⁾ That a legacy may be implied, fee Crowder v. Clowes, 2 Vez. Jun. 449. Wainright v. Wainright, 3 Vez. 558.

made use of frequently in testaments, as goods, chattels, moveables, ready money, debts, houshold-stuff, and the like. Now, by goods, the civil law doth oftentimes understand, not only those things whereof a man is owner, or justly possessed, but also such as belong to him, whether corporeal or incorporeal, for the which he may have a lawful action, as debts (1). And fo with us, the words goods and chattels, in a devise, will pass a right to fet aside a release obtained by fraud (p). 2dly. Sometimes it is understood of a man's whole estate, both actively and pasfively, which devolves upon him, who, in that law, is called bæres, or heir (2). (2) Swinburne,

(1) Swinburne, part 7. f. 10. p. 475, 486. 5th ed.

3dly, By part 7. f. 10.

(p) That a devise of all the testator's goods will pass a bond, see Anon. I P.Wms. 267. Ryall v. Rolle, 1 Atk. 180, 182., unless there be some words in the will indicative of an intent to the contrary, as in Woolcomb v. Woolcomb, 3 P. Wms. 112., note (1), Cox's ed. But bonds, as a species of choses in action, not admitting of locality as money does, will not pass under a bequest of goods and chattels in a particular place. Chapman v. Hart, I Vez. 271. Moore v. Moore, I Bro. Ch. Rep. 127. See also Green v. Symond, 27th February 1730. Mr. Brown's Appendix, p. 6. Jones v. Lord Sefton, 4 Vez. 166. Neither will debts due by bond pass by a bequest of all the testator's moveable goods.

(3) Swinburne, part 7. f. 10. P. 475. (4) Calye's Cafe, 8 Rep. 33. (5) Portman v. Willis, Cro. Eliz. 387. 3dly, By the word goods, the same law doth understand no more, but only a man's clear goods, his debts deducted (3). And, in the common law (q), the word goods extends neither to things in action (4), nor chattels (5), nor freehold (6).

(6) Calye's Cafe, 8 Rep. 33.

goods. Sparke v. Denne, Sir W. Jones, 225. That a leafe will pass by a bequest of all the testator's goods, see Portman v. Willis, Cro. Eliz. 387. But see Godolphin, 392, 7.

(q) That specialties, debts, leases, &c. have been held in the construction of wills to pass by the word goods, must therefore be referred to the rules of the civil and canon law, being allowed to govern the construction of wills of personal estate. See Portman v. Willis, Cro. Eliz. 387. Anon. I P.Wms. 267. Moore v. Moore, I Bro. Ch. Rep. 127.

SECTION VII.

CHATTELS is a word more obvious in the laws of this realm than in the civil law, and takes in all his goods, except such as are of the nature of freehold,

or parcel thereof (1). And these chattels (1) Swinburne, part 7. s. 10. are divided into real or immovable (r), and perfonal or movable (s). Among the latter, money is accounted, though fome have held that ready money is neither goods nor chattels, because it is of no worth in itself, but is made fo only by the confent of men, as necessary for common life; but, according to others, a devife of all his chattels paffes the whole estate of the testator, both actively and passively, as in case of a devise of all his

P. 475. Co. Litt. 118. b.

- (r) "Chattels real, faith Sir Edward Coke, are fuch as concern the realty, as terms of years, the interest of tenant, by flatute staple, by statute merchant, by elegit, and fuch like. I Inft. 118. b. And thefe are called real chattels, as being interests issuing out of or annexed to real estates; of which they have one quality, viz. immobility, which denominates them, real; but want the other, viz. a fufficient legal indeterminate duration; and this want it is that constitutes them chattels." See 2 Bla. Com. 386. As to leases for years passing by general words, see Rose v. Bartlett, Cro. Car. 292. Lane v. E. of Stanhope, 6 Term Rep. 652.
- (s) Chattels personal are properly things moveable, which may be annexed to or attendant upon the perfon of the owner, and carried about with him from one place to another: Such are animals, houshold-stuff, &c. Co. Litt. 118. b.

(2) Swinburne, part 7. f. 10. P. 477. goods (t); for it is as extensive, and more (2).

(t) That the whole of the testator's personal estate, and confequently his money, will, by the civil law, pass by a general bequest of all his goods, or of all his chattels, is established by the authorities referred to in Swinburne, part 7. § 8.; and the cases which seem to break in upon this position will be found to have proceeded on the particular language of the bequest. In the Anon. Case, in Pre. Ch. 8., the testator bequeathed his wife 12001. in money, and all the goods and chattels, &c. in and belonging to his house in N.; in which house there was 4001. in money; and the question was, Whether this 4001. should pass by the will? The court held it should not; for 400% is a considerable sum, and the testator could not be supposed to be ignorant of its being in the house: Therefore, had he intended to pass it, he would not have couched it under general words, but would at first have given his wife 1600/. In the case of Woolcomb v. Woolcomb, 3 P. Wms. 112., the bequest was, of all the testator's houshold goods, and other goods; and there was also a bequest of the refidue; which bequest of the refidue would have been frustrated, had the words "other goods" been held to carry all the personal estate. The court, therefore, held that fuch words "other goods" must be intended to fignify things of the like nature with houfhold goods. So in Trafford v. Berridge, I Eq. Ca. Ab. 201. pl. 14. See also Cook v. Oakley, I P.Wms. Timewell v. Perkins. 2 Atk. 103. Cornforth, 2Vez. 279. Cavendish v. Cavendish, 1 Bro. Ch. Rep. 467.; where this rule is recognized, viz. that things to pass under general words must be ejusdem generis with those expressly devised. But if there be nothing

nothing in the will indicative of an intention to restrict the general import of the words "goods and chattels," money, if not an extraordinary fum, and just received, will pass. See Chapman v. Hart, IVez. 273.

SECTION VIII.

MOBILIA is strictly such goods as are paffively moveable or removeable; and moventia, fuch as actively, and by their own accord, do move themselves, as live goods. Yet regularly moveables are indifferently understood of both, and will pass them in a devise; as also industrial fruits, viz. fuch as are fown by men's industry, in order to be reaped with increase ere long; for these are moveable babitu, or in the intention and purpose of the fower. And these emblements are to be put in the inventory (1); for the rule (1) Swinburne, of accessorium sequitur principale is true in fruits natural (u), but not in fruits industrial.

part 7. f. 10. P. 478, 479.

(u) "By natural fruits are intended fuch as grow fpontaneously,

Immoveable goods, or chattels real (x), are those which do not immediately belong to the person, but to some other thing by way of dependancy; as trees growing, or a term for years. Yet it will not extend to the industrial fruits, for they are reckoned among the moveable; but it takes in all leafes, and all the natural fruits; as also whatever is appurtenant to, or parcel of the thing demised, which, if it were out of leafe, should belong to the heir, and not to the executor (2).

(2) Swinburne, part 7. f. 10. P. 480.

fpontaneously, without any great labour or cost, as grafs or apples, &c.; and thefe the legatee cannot recover as moveable, unless they were separated at the time of the testator's death; for, till they are separated, they are accounted not only as annexed to the ground or trees whereon they grow, but are also reputed as part and parcel of the body whereon they grow, and whence they are nourished, and consequently of the fame nature and condition, namely, immoveable." Swinb. part 7. f. 10. p. 478, 479.

(x) As chattels real pass as immoveables, so chattels perfonal pass as moveables. See Godolphin's Orph. Leg. part 3. ch. 20. f. 2.

SECTION IX.

READY money is justly reputed among the moveable goods of the deceased (y); for no goods are more moveable, and it is therefore termed current. But although this is regularly true, yet it fails in particular cases. As, 1st, of the money that arises from lands devised to be fold, vide 21 H. 8. c. 5. 2dly, Of money laid up for payment of lands purchased; for it is not likely that he intended to pass that money in prejudice to the heir, according to that rule of law, that nothing doth pass by general words, where it is likely the giver would not grant them by special. Also in favour of the heir, many things, which of their own nature are moveable, by conftruction or fiction of law are nevertheless accounted immoveable, as hawks and hounds, and deer in the park (1), &c.

(1) Swinburne, part 7. f. 10.

p. 479, 480. Godolphin's Orph. Leg. part 3. c. 21. f. 12.

⁽y) And will therefore, in general, pass under the description of moveables. But see Godolphin's Orph. Leg. part 3. ch. 21. s. 9., where several other cases are stated, which, it is contended, are not within the general rule.

SECTION X.

EBTS are neither moveable nor immoveable goods, nor will they pass as fuch (z). But if the testator did bequeath all his goods moveable and immoveable whatfoever, these universal figns ftretch the word to which they are joined, to the comprehension of whatsoever is fignified by them, not only properly, but alfo improperly, or elfe they would be idle and superfluous; which superfluity is to be avoided, especially in a testament, wherein commonly less is written than fpoken, and less spoken than was meant, partly through want of skill, and partly through want of time, And although no man is prefumed to think that which he

doth

⁽²⁾ This point feems to have been, for a confiderable length of time, vexata questio among the civilians. Swinburne has brought together the reasoning for and against it, and seems to prefer the opinion of those who deny that, by the civil law, debts will pass by the description of goods moveable or immoveable. See part 7. § 10. p. 481, 482, 483. See also Wentworth's Office of Executor, 250. Sparke v. Denne, Sir W. Jones, 225.

doth not speak, yet, by the common use of speech within this realm, debts are understood to be comprehended under that general legacy of all goods moveable and immoveable.

SECTION XI.

HOUSEHOLD stuff is instrumentum patris-familias domesticum et quotidianum (1). But this wants some further ex- (1) Dig. lib. 33. planation. In the first place, then, there is lectile legata. no doubt but these particulars are to be reckoned as part and parcel of household fluff, viz. tables, stools, chairs, carpets, hangings, beds, bedding, basons with ewers, candlesticks, all forts of vessels, ferving for meat and drink, being of earth, wood, glass, brass, or pewter, pots, pans, fpits, and fuch like. 2dly, Without all difficulty, apparel, books, weapons, tools for artificers, cattle, victuals, corn in the barn or granary, wains, carts, plough-VOL. II. gear,

ti. 10. de fupel-

(2) Swinburne, part 7. 9 10. p. 484, 485. Godolphin's Orph. Leg. part 3. c. 20.

gear, vessels affixed to the freehold, are no part of household stuff (2). And in ancient times, nothing which was made of filver or gold was accounted household stuff; because of the severity and frugality of old times, when veffels of gold and filver were very rare. But, upon the change of manners, ex ebore, testitudine atque argento, jam ex auro etiam atque gemmis supellectili utimur. And thus also these vessels of filver, gold, and precious stones, as bason and ewer, bowls, cups, candlesticks, &c. pass as part of household stuff or furniture. Yet not indistinctly or absolutely, but with this limitation, fo that it be agreeable to the testator's meaning, otherwife not; that is, if the testator, in his lifetime, did use to reckon them amongst his household-stuff; but if the testator did esteem them as ornaments, rather than utenfils, and did use them for pomp or delicacy, rather than for daily or ordinary service of his house, in this case they do not pass under the bequest of household stuff (a). Or if the testator did use

⁽a) Whether, by the rule of the civil law, plate would pass as household stuff, is also a question upon

to number things of another kind amongst his household stuff, which, without doubt, are not so to be esteemed, as his apparel, and such like, then, although he did intend that his apparel or those things should pass under the name of household stuff, yet the legatory cannot recover them (3). So surniture (b) in a large house takes in plate; but not where he distinguishes the chapel plate from the surniture (4).

(3) Swinburne, part 7, \$ 10. p. 485, 486. (4) Franklin v. E. of Burlington Pre. Ch. 251. 2 Vern. 512.

which the writers are at variance; but, with us, though it was formerly held, that plate would not pass by a bequest of all testator's household goods, (Jesson v. Essington, Pre. Ch. 207.) yet it seems now to be settled, that it will, if it appear that the testator was in the habit of using plate, or was of a rank in life which rendered plate an article suitable to his domestic establishment. Lilcot v. Compton, 2 Vern. 638. Masters v. Masters, 1 P. Wms. 425. Nichols v. Osborn, 2 P.Wms. 419. Snelson v. Corbet, 3 Atk. 369. Kelly v. Pawlett, Ambl. Rep. 605. It is scarcely necessary to observe, that the rule does not extend to articles of surniture or plate bought or made by the testator in the way of trade, with a view to sale. See Ambl. Rep. 611.

n

r

e

O

te

n h (b) That a library will not pass under the description of furniture; see Bridgman v. Dove, 3 Atk. 202. That books or wine will not, see Porter v. Tunney, 3 Vez. 311.

SECTION XII.

AND although there be no defect in the testator's meaning, yet because the same is no way expressed by words, which, by their own nature, or by common use of speech, might testify this meaning of the testator, therefore is the legacy void, as if it had not been written or spoken; unless it were the express will of the testator, that the legacy should stand good notwithstanding his misnaming thereof (1). Non enim ex opinione singulorum, sed ex communi usu verba exaudiri debent. But, it is to be observed, that error in the name, quantity, or quality of the thing bequeathed (c)

(1) Swinburne part 7. § 5. p. 460.

(c) By this must be understood error in the proper name, and not in the name appellative; as if the testator, intending to devise Black-acre, devise Green-acre, having no such land, the error is not in the substance, but only in the proper name of the thing intended to be devised, and therefore the legacy shall take esset; but if the testator intending to bequeath a horse, bequeath a house, not having a house, the error in the substance of the thing will disappoint the legacy. There are circumstances, however, which will prevent error in the name appellative avoiding a legacy. See Swinb. part. 7. §. 5. p. 46c.

doth

doth not hurt the legacy, when the body or substance is certain; and so of error in the name (d) or quality of the person (e). But error in the body or substance of the thing bequeathed doth destroy the legacy, as well as in the person of the executor or legatory (2). And so error in the form of the disposition maketh it to be of no sorce; as if a condition is omitted by mistake (f), the legacy is void (3).

- (d) In what cases error in the name of the legatee or executor will affect the appointment or legacy; see Swinb. part. 7. § 5. Demare v. Rabello, 3 Bro. Ch.
- (e) Unless the quality of the executor or legatee be the cause assigned of the testator appointing him executor or legatee. Swinb. part 7. § 5.

Rep. 446. and cases there cited.

e

(f) But if the testator appoint an executor, or bequeath any legacy, according to certain conditions afterwards to be written, the disposition is good, as if it were made without condition, unless it do appear that the testator did mean that the disposition should not take place without some condition. Swinburne, part 7. § 5. p. 462.

- (2) Godolph. p. 3. c. 25. § 16. Swinb. part 7. § 5. p. 460.
- (3) Swinburne, part 7. § 5. p. 462.

SECTION XIII.

AND a will speaks not until the death of the party, for till then he is master of his own will; but the construction is to be made, as matters stood at the time of making the will (g): As where A. de-

(g) There certainly are bequests which, in order to effectuate the intent, may be construed with reference to circumstances at the time of testator's making his will; as where the testator gives a specific thing as being then in his possession, and which, in its nature, is not fluctuating, and he gives it by a particular, and not a collective, appellation, the bequest shall be construed with relation to the state of the thing at the time of testator's making his will; as if the testator bequeaths the leafes which he now has, or all the horses now in his stable, or the arrears of an annuity now due; in fuch cases subsequent leases, or after-purchased horses, or arrears afterwards accrued due, will not pass, I P. Wms. 597. Attorney-General v. Bury, 1 Eq. Ca. Ab. 201. See also Baugh v. Read, I Vez. Jun. 260. But, I apprehend, these cases are to be referred to the particular expression of the bequest, and that they will not bear out the general proposition stated by our author; for though a bequest of a specific thing then in the testator's possession, by a particular, and not a collective description, will not pass things ejusdem generis acquired by the testator after the making of his will;

A. devised the surplus of his estate to his brothers, B., C., and D., and the children of his brother E., and of his sister F., equally to be divided; and if any of my brothers die before the estate is got in and divided, his or their share to go to his or their children. B. died before the estate was got in and divided, and before the testator, yet still he died before the estate was got in and divided. But then it is

yet if the bequest be of a thing in its nature fluctuating, as a flock of sheep, or by a collective term, as library, sheep afterwards produced, and books afterwards purchased, will pass, in respect of the fluctuating nature of a flock of sheep, and the collective description of his books. All Souls College v. Codrington, I P.Wms. 597. Dean of Christ-Church v. Barrow, Ambl. 641.

.

S

t

d

f

n

n

).

t,

r-

11

1-

ñ

t,

It may also be necessary, in some cases, to refer to the time of the testator making his will, in order to ascertain the objects of his bounty; as in case of a devise to all his children or grandchildren, without any reference to his death, or time suture, such devise is held, primâ facie, to refer only to such children and grandchildren as were living at the time of testator making his will. Northey v. Strange, I P. Wms. 342. Pre. Ch. 470. But see Roberts v. Higman, 12th July 1779. I Bro. Ch. Rep. 532. note. Sherer v. Bishop, 4 Bro. Ch. Rep. 55.

objected, that his share is to go to his children, when he had no share ever vested in him; but that is to be understood the share intended him. So a devise of 300% to three at twenty-one, and, if any die, to go to the survivors; one died in the life of the testator; this devise over is good (1).

(1) Perkins v. Micklethwaite,

1 P. Wms. 274. Ledsome v. Hickman, 2 Vern. 611. Miller v. Warren, 2 Vern. 207. Willing v. Baine, 3 P. Wms. 113. Scoolding v. Green, Pre. Ch. 37. Hornsby v. Hornsby, Mosely's Rep. 319.

SECTION XIV.

AND if the gift be general, it shall be expounded generally (h), for the court will not restrain the testator's bounty.

(b) Where the court, in the construction of a will, restricts the generality of the bequest, it is because the bequest would otherwise fail, from the uncertainty and generality of its expression; as where the bequest is

ty. As where one gave legacies of 151.

a-piece to each of his relations of his father

to the relations, or the poor relations, of the testator, or to the relations of A., the infinite extent and comprehension of the expression, (though it does not include those by marriage, Maitland v. Adair, 3 Vez. 231.) unless narrowed and restricted by reference to the flatute of distributions, would wholly defeat the bequest; for it were endless to inquire for the most distant relations. Roach v. Hammond, Pre. Ch. 401. Carr v. Bedford, 2 Ch. Rep. 77. Anon. 1 P. Wms. 326. Thomas v. Hole, Forrest. 251. Harding v. Glynn, 1 Atk. 469. Edge v. Salisbury, Ambl. 70. Whithorn v. Harris, 2 Vez. 527. Isaac v. Defriez, Ambl. 595. Widmore v. Woodroffe, Ambl. 636. Green v. Howard, I Bro. Ch. Rep. 31. Hands v. Hands, cited 3 Bro. Ch. Rep. 69. Rayner v. Mowbray, 3 Bro. Ch. Rep. 234. Relations at large, however, were held to be the objects of the testator's bounty, in Supple v. Lawson, Ambl. 729. But if the bequest be to the testator's descendants, or to the descendants of A., the necessity of referring to the statute of distributions does not arise, for such descendants are capable of being afcertained. Crossly v. Clare, Ambl. 397. Butler v. Stratton, 3 Bro. Ch. Rep. 367. So if the legacy be to the iffue of A., the word iffue being fufficient to include all the descendants, Davenport v. Hanbury, 3 Vez. 257. And in those cases in which the court does refort to the statute of distributions, for the purpose of limiting the objects of the bequest to relations, it does not confider itself bound, in the diftribution of the fund, to adopt the proportions prescribed by the statute; but will distribute it per capita, and

(1) Jones v. Beale, a Vern. 381. ther and mother's fide (1). The court would not restrain the devise to the relations,

in fuch shares as any particular expression of the bequest may call for. Carr v. Bedford, 2 Ch. Rep. 77. Griffith v. Jones, 2 Ch. Rep. 179. Thomas v. Hole, Forrest. 251. Green v. Howard, 1 Bro. Ch. Rep. 31. With respect to a bequest to the children of A. generally, it feems fettled, that it shall not extend to children not born at the time of the testator's death; under which description is comprehended a child in ventre sa mere, Clarke v. Blake, 2 Vez. Jun. 673.; nor if the fund be distributable when the eldest child shall attain a certain age, shall it extend to children born after fuch period; Heathe v. Heathe, 2 Atk. 121. Ellifon v. Airey, I Vez. III. Horsley v. Chaloner, 2 Vez. 83. Singleton v. Singleton, I Bro. Ch. Rep. 542. note. Hughes v. Hughes, 3 Bro. Ch. Rep. 352. ner v. Francis, 2 Bro. Ch. Rep. 658. Hill v. Chapman, I Vez. Jun. 407; Hoste v. Pratt, 3 Vez. 730., unless there be a prior bequest of the fund or thing for the life of another, in which case all the children born in the life-time of tenant for life will take; Ellison v. Airey, I Vez. III. Godwyn v. Godwyn, I Vez. 226. Bartlett v. Hollister, Ambl. Rep. 334. Ayton v. Ayton, I Bro. Ch. Rep. 542. note; or unless the time of payment is postponed until a future period; Congreve v. Congreve, I Bro. Ch. Rep. 531. Andrews v. Partington, 3 Bro. Ch. Rep. 402.; or unless A., whose children are to take, has no child living at the time of testator's death; Haughton v. Harrison, 2 Atk. 329.; or A. having one child only, the bequest be to his children, with a clause of survivorship. Maddison v. Andrews, I Vez. 57.; or hav-

ing

so where a will was made in these words, Item, I give to such of my servants as shall be living with me at the time of my death, one year's wages. Although stewards of courts, and such who are obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will, yet the court will not narrow it to such servants only as lived in the testator's house, or had diet from him (2).

(2) Townshend v. Windham, 2 Vern. 546-

ing two, with a limitation to the furvivors or furvivor, Gilmore v. Severne, 1 Bro. 582. That a child in ventre sa mere shall be included in a bequest to children living at the testator's death, see Clarke v. Blake, 2 Vez. Jun. 673.; but see contra, Pierson v. Garnett, 2 Bro. Ch. Rep. 38. Cooper v. Forbes, 2 Bro. Ch. Rep. 63.; see also Heath v. Heath, 2 Atk. 122.: Sanders' Ed. where the cases are collected and classed.

CHAP. II.

How Legacies may be destroyed or lost:

SECTION I.

E T us now fee how a legacy, which was at first good, may afterwards be destroyed or lost; and this is, 1st, by ademption, or translation; 2dly, where it is lapfed; adly, the testator's estate falling fhort. Ademption is the taking away of a legacy before bequeathed (1); translation is a bestowing the legacy before bequeathed upon some other person (2): So that ademption may be without translation, but translation of a legacy cannot be without ademption. This ademption of legacies is two-fold, expressed and implied. The expressed is, when the testator doth by words take away the legacy before given. An implied ademption is, when the testator doth, by deed without words. take

(1) Swinburne, part 7. § 20. Godolph. part 3. c. 25. § 13. (2) Swinburne, part 7. § 21. take away the legacy (a). But ademption of legacies is no more to be prefumed, than

(a) Where a father makes a provision for a child by his will, and afterwards gives to fuch child, being a daughter, a portion in marriage, or being a fon, a fum of money to establish him in life, (such portion or fum being of equal or greater amount than the legacy,) it is an implied ademption of the legacy; for the law will not intend that the father defigned two portions to one child: Hartop v. Whitmore, I P. Wms. 680. Blois v. Blois, 2 Ch. Rep. 85. Jenkins v. Powell, 2 Vern. 115. Jeffon v. Jeffon, 2 Vern. 257. Farnham v. Phillips, 2 Atk. 216. Watfon v. Earl of Lin-Ellison v. Cookson, 2 Bro. Ch. coln, Amb. 325. Rep. 307.; but this implication will not arife, if the provision by the will be by bequest of the residue, Farnham v. Phillips, 2 Atk. 216.; or if the provifion in the father's life-time be subject to a contingency, Spinks v. Robins, 2 Atk. 491., or be not ejusdem generis with the legacy; Grave v. Earl of Salisbury, I Bro. Ch. Rep. 425.; or if the testator be a stranger; Shudall v. Jekyll, 2 Atk. 516. Powell v. Cleaver, 2 Bro. Ch. Rep. 499.; and fuch implication is always liable to be rebutted by evidence. Shudal v. Jekyll, 2 Atk. 516. Debeze v. Mann, 2 Bro. Ch. Rep. 165, 519. But the testator, by a codicil, subsequent to giving the portion or advancement, ratifying and confirming his will, though a new publication, has been held not fufficient to rebut the prefumption of his intention to adeem the legacy; fuch words being only words of form. Irod v. Hurst, 2 Freem. 224. With respect to what legacies shall be considered accumulative, and what merely in substitution, the rule which prevails

(3) Swinburne, part 7. § 20. than the revocation of the testament, unless it be proved (4), notwithstanding the length of time, or alteration of circumstances; for a revocation by implication must be a necessary implication, and wholly inconsistent (b). And where it is said, that

as

prevails in the civil law has been distinctly recognized as the rule which ought to obtain in our courts of equity, namely, that where two pecuniary legacies are given by the same will, primâ facie, they are not accumulative; but where the two legacies are in different writings, there the presumption shall be that they were intended as accumulative, see Hooley v. Hatton, I Bro. Ch. Rep. 390. in a note; but the presumption in either case may be repelled by internal evidence, Allen v. Callow, 3 Vez. 289. Barclay v. Wainwright, 3 Vez. 462.; Holford v. Wood, 4 Vez. 76. As to ademption of specific legacies, see the following section.

(b) The law will presume a testator to have intended to revoke his will, not only from a subsequent alienation or disposition of his property, inconsistent with his will, but also from a material alteration in the circumstances of his situation; and, therefore, a subsequent marriage and issue will, by implication, revoke a will made during celibacy. This implication is evidently sounded on the presumption that a testator, having contracted a new relation, means to discharge the duties which attach to it; and, as new objects o care arise, which he did not contemplate when he made

as the latter testament doth destroy the former, so the latter part of the testament doth

his will, such will shall not be regarded as intended to prevail, but by operation of law is revoked. See Lugg v. Lugg, I Lord Raymond, 441. Parson v. Lance, Ambl. 557. Wellington v. Wellington, 4 Burr. 2165. Jackson v. Hurlock, Ambl. 490., and cases there cited. Christopher v. Christopher, 4 Burr. 2182., in a note. Spragg v. Stone, Ambl. 721. Brady v. Cubit, Doug. Rep. 31. Shepherd v. Shepherd, 5 Term Rep. 57., in a note; and Doe, on demise of Lancashire v. Lancashire, 5 Term Rep. 49.; in which it was held, that marriage, and the birth of a posthumous child, would raise the presumption of an intention to revoke.

But if the disposition made by his will was not of his whole estate, the prefumption of change of intention will not arise; and even in those cases in which the prefumption does arise, evidence is admissible to re-See Brady v. Cubit. It being thus fettled, but it. that a fubfequent marriage, and having iffue, will amount to an implied revocation of a will disposing of the whole of the testator's estate, it may be material to confider, whether either of those circumstances singly, as a fubfequent marriage, or the fubfequent birth of a child, will raise such presumption .- Ift, With respect to marriage alone. In considering this point, it will be proper to distinguish wills of real estate from wills of personal estate; for, as to wills of real estate, it is not necessary that marriage alone should be a revocation of a will; because the law has, in most cases, provided for the wife out of her husband's lands; and though

doth overthrow the former part: that is true, when it is evident that the testator did

though it were a revocation, it would not let in the claim of the wife, as the land would in fuch case defcend to the heir. As to wills of personal estate, Lord Northington, in Jackson v. Hurlock, Ambl. 494., is reported to have faid, "There is no determination that marriage fingly would revoke a will of personalty. It would be dangerous to infift that marriage fimply revokes a will; upon the other hand, it would be as dangerous to fay that no alteration of circumstances shall operate as an indication of intention to revoke. If fuch a case were to come before me, upon a legal intereft, I should put it into a proper way to be determined. There feems little reason to presume such intention, from the simple act of marriage, for the law has provided for the wife. There is no determination that marriage fimply is a revocation of a will of land."

Doctor Hay, in giving judgment on the above case of Shepherd v. Shepherd, states, "that marriage and children at once revoke a will, but marriage alone will not; because the law allows other provisions for a wise, and she may provide for herself previous to her marriage; if she do not, it is her own fault, and the law will not presume any thing in her favour to revoke her husband's will. This is settled in abundance of cases, and is an incontrovertible position." In another passage of that very elaborate judgment, the learned Judge, in observing upon the case of Jackson v. Hurlock, states, "that case goes no further than to recognize the rule, that marriage without issue cannot revoke a will; which rule was before established by many cases."

did mean it should be so. But if it be doubtful, we ought to labour diligently to save

cases." A solemn adjudication upon a point immediately before a court of competent jurisdiction must, in all cases, materially weaken the force of any general reasoning militating against such adjudication; but it is observable, that this point, whether marriage alone will amount to an implied revocation of a will of perfonal estate, was not the point before the court; and that, though the learned Judge treats it as a point determined in many cases, he does not state a single one; and he evidently, if reliance may be had on the report of Jackson v. Hurlock, by Mr. Ambler, strains Lord Northington's observation in his judgment on that case beyond its fair tendency; for his Lordship does not recognize the doctrine, that marriage alone is not an implied revocation of a will of personal estate, but merely observes, that there is no determination that it is; and when referring to a will of real estate, he remarks, that there feems little reason to presume such intention from the simple act of marriage, for the law has provided for the wife; but he does not even in that case affirm, that it had been decided that it was not, but confines himself to stating, that "there is no determination that marriage fimply is a revocation of a will of land." In the absence of precedent, and I confefs I have found none, we must necessarily resort to general reasoning. That marriage and issue will raise an implication of intent to revoke a will made during celibacy is admitted; but upon what is such implication founded? Upon the credit which is due to every man, that he intends to discharge those moral duties which attach to the relation of hurband and father; or, to VOL. II.

fave the testament from contradiction. If, therefore, the same thing be devised to two.

use the language of Dr. Hay, as " new objects of care arise," to presume that he intends to extend towards them that protective kindness which is morally and naturally due to them. But why restrict the presumption which arises in favour of wife and children to the concurrence of both circumstances? The claim of the wife to a provision from the husband has, at least, a moral duty for its foundation. To allow a will made before the relation was contracted, and without requiring any circumstance indicative of an inclination that such will should stand, though by its effect the wife be left wholly destitute, seems to require a more conclusive reason than any I have met with in its support. Out of the real estate of which the husband is seized, the law has fecured to the wife a provision; but out of the personal estate of the husband, except by special custom, the law has made no fuch provision. The first reason, therefore, relied on by Dr. Hay, that "the law has made other provision for the wife," does not generally apply to wills of personal estate. The second reason which he affigns is, that " he may provide for herfelf previous to the marriage." It is certainly true that the wife might, previous to her marriage, stipulate for a provision out of personal estate; but it is equally true, that the might stipulate for a provision out of real ef-But the law has not, with respect to real estate, confided her interest to her discretion; its providence has interposed between her and those influences which might occasion her to overlook or difregard the confiderations of prudence; it has given her an interest in the real effate of which her husband is feifed; and however

p.

two, and one dies, the other shall have the whole; or, if both survive the testator, it shall

however the good effects of this legal provision may, by means of trusts, &c. be disappointed, the principle upon which it proceeds is too ftrongly marked and beneficially felt in the right of the wife to dower, to justify the narrowing of its operation. But it is faid, if she do not provide for herself previous to her marriage, it is her own fault, and the law will not prefume any thing in her favour to revoke her husband's will. What is her fault? That she has not, when acted upon by the tenderest influences of the heart, pursued the dictates of prudence; that she has confided her claims to a provision, to the honour, integrity, and affection of the man to whom she had confided her happinefs. But if it be true that the law will not prefume any thing in favour of the wife in respect of her omisfion, is it equally true that the law will prefume nothing in favour of the husband? What does his moral character require? That the law should presume that he meant to make that provision which a husband is bound, " and probably would have made, had not a premature death prevented it." To supply that provision requires no stretch of rational conjecture; the honour, integrity, and affection of the husband may be prefumed, and upon that prefumption the moral claims of the wife may be fatisfied. No precedent that I have been able to find contradicts this conclusion; but, if there should be any, the reader will, I trust, examine its principle and reasoning before he entirely submits to its authority; bearing in mind, that that for which I have venturedto contend is not an absolute but merely an implied revocation, which is confequently liable to be en-Aa 2

e

5

e

1,

25

ly

n If

at

or

ie,

ef-

te,

11-

es

he

est

ver

(4) Swinb.
part. 7. f. 21.
Blamford v.
Biamford,
3 Bulf. 105.
10 Mod. 522.

fhall be divided betwixt them (c), or they fhall take it jointly (4). But it is fufficient,

3 Bulf. 105. Anon. 3 Leon, 11. c. 27. Wallop v. Darby, Yelv. 209. Cro. Eliz. 9. 10 Mod. 522. Fane v. Fane, 1 Vern. 30. Ridout v. Pain, 3 Atk. 493.

countered by every circumstance indicative of a different intention.

The next point is, whether the birth of a child subfequent to the making of a will, the effect of which would leave the child wholly destitute, is of itself a circumstance sufficient to raise a presumption of the testator's intention to revoke such will.

Dr. Hay, in the case of Shepherd v. Shepherd, selt how "desirable it was to provide for the innocent, and to supply to a child that provision which a father is bound to make, and probably would have made had not a premature death prevented it. But however well-founded (continues the learned Judge) this maxim may be, and worthy the attention of a legislator and politician, yet it must yield to the positive laws of society, particularly in a country of freedom like this; otherwise, to benefit one, all might be injured." He afterwards observes, that a revocation had never been implied "on the mere ground of the birth of a child."

If reliance may be had on the accuracy of the reporter, the case of Overbury v. Overbury, 2 Show. 242., is an authority in favour of such an implied revocation. "Upon an appeal before sentence to the delegates it was adjudged, that if a man make his will, and disposes of his personal estate amongst his relations, and afterwards hath children and dies, that this is a revocation of his will, according to the notion of the civilians,

P

cient, in last wills, for the revoking of a legacy, that the testator's meaning do appear

civilians, this being inofficiosum testamentum." And in the case of Wingfield v. Combe, 2 Ch. Ca. 16., Lord Nottingham stated the following case. " A., having only a daughter, devised his trustees should convey the land to the daughter in fee; the testator recovered, and after had a fon; the daughter shall not carry the land from the fon." But, though there were no authority in favour of a prefumption allowed to deferve the attention of the legislator and politician, I should submit, that its adoption by the Judge would not be a stretch of those powers and found discretion which are confided to him in the administration of justice. Dr. Hay stated several cases which appeared to him to negative the claim of the child. The first case, Wells v. Wilfon, is, however, an authority in favour of the child; but the learned Judge refers the decision to the peculiar circumstances of the case. The second case, Waltham v. Gray, terminated in a compromise. The third case, Ward v. Phillips, respected the claim of a posthumous child, and the decree which fet afide the will was reversed by the delegates: "This, says the learned Judge, is a folemn adjudication, and, if founded on principle, must be decisive in the present case." It is observable, that the case of Shepherd v. Shepherd was also upon the claim of a posthumous child; but it may be inferred, from the statement of that case, that the mother was in the third month of her pregnancy at the time of her husband's death; which affords a reasonable ground for prefuming the husband's knowledge of her fituation, and consequently for presuming his intention to provide for fuch child. But, in the case of Ward v. Phillips,

t .

-

y

r-

r-

n-

e-

w.

0-

le-

ill,

ns,

re-

the

ns,

pear by an act otherwise insufficient; as if the gift or alienation, not being of necessity,

Phillips, the statement affords no such inference; and it is possible that the father was, at the time of his death, wholly ignorant of the pregnancy of his wife; a fact which would prevent any prefumption of particular intent in favour of the child. But not to infift on any nice distinction or even material difference between the cases of Ward v. Phillips, and Shepherd v. Shepherd, and allowing the first to be a solemn adjudication against the claim of the child, I will now proceed to try it by the test proposed by the learned Judge, namely, whether it be founded on principle, and will, for fuch purpose, waive the authority of the contrary decision in the case of Overbury v. Overbury, and the other case referred to in 2 Ch. Ca. 16.—The principle which raifes the prefumption, that every man means to difcharge the natural and moral obligations which attach upon him, is a principle founded on the purest candour, and its applicability to certain cases is allowed; unless, therefore, there be in the law of England some positive rule which fo restricts and narrows the operation of this principle, it will be difficult to maintain, that the claims of general conveniency, or that the interests of justice require its circumscription within the limits prescribed to it by the learned Judge. It is admitted, that in the Roman law the birth of children operated as a revocation of a precedent will, and that the Roman law in general guides the decrees of the ecclefiaffical courts. But (fays the learned Judge) "it guides our decrees no further than where it stands uncontradicted by the English law."-The law of England certainly does, in some instances, control the civil

law

ceffity (d), but voluntary, be void in law (5): Yet the second will must be a

(5) Swinb. part 7. f. 20. 21. Roper v. Radcliffe,

1 Bro. Parl. Ca. 450. Beard v. Beard, 3 Atk. 72.

good

law in matters of ecclefiaffical cognizance; and, in fuch instances, it is the duty of the ecclesiastical courts to reject the rule of the civil law. But how or where has the law of England laid down a rule different from the rule of the civil law upon this point? Had fuch rule been prescribed by the legislature, it had been produced; had it grown up with our common law, it had been traceable, at least, in some of our institutes; but neither the statute-book nor the profound treatifes of our most learned and elaborate writers furnish any such rule. It must therefore, if it do exist, be some conclusion neceffarily refulting from a fubstantial difference between the Roman and English law in some other particular, and upon this ground the learned Judge has rested it. "In this point, he observes, there is a material distinction between the Roman and English law; in the former, the children are confidered as having a property in the effects of the father; in our law we know of no fuch thing, and therefore the effect of the birth of children must be very different." But though by the law of England children have not an indefeasible property in the effects of the father, they have a moral and natural claim upon him. The law of England has not, indeed, in all cases raised that claim into a legal right; neither has it annulled it, but has confessedly acknowledged it and given it effect at least under some circumstances: Marriage and iffue are allowed to operate as an implied revocation. Has the wife property in the effects of her husband? If she has, by a parity of reasoning, marriage alone would be an implied revoca-

,

t

-

S

n

at

e

it

(6) Swinb.
part 7. f. 14.
Onions v.
Trye,
1 P.Wms. 343.

good will, in all circumstances, to revoke a former (6), if being intended to operate

as

Limbery v. Mason, Comyns Rep. 451.

tion; but it is faid, that fimply it is not. The wife then has no property in the effects of the husband, neither have the children any property in the effects of their father; but marriage and iffue will operate as an implied revocation: But, as neither wife nor child has a property in the effects of the testator, the revocation cannot be implied in respect of a property in the effects of the testator. The distinction, therefore, between the Roman and English law in this particular cannot be the foundation of the difference contended for between the birth of a child and marriage, and the birth of a child only. The learned Judge proceeds: "In England the father may dispose of his effects as he pleases, and his will must stand, if it be plain, by a folemn execution, that he meant it should stand." The testamentary right is admitted; but if the effect of its exercise be as stated by the learned Judge, that the will must stand, it might be material to inquire how its revocation is implied by marriage and the birth of a The learned Judge admits, that "a parent shall not be presumed to leave his child without provifion, an infant who certainly could never have offended him:" "But here (fays the learned Judge) he has actually done it;" and so he has actually done it in the case in which the law will imply a revocation. equally under his hand, but the law interpofes and prevents an effect which it cannot prefume the testator to have intended, without refusing to him credit for those moral and natural feelings with which nature has fecured the claims of the child. But though the law prefumes

l,

f

n

d)-

e

2-

ed ed

ne

:

ne

a

Et

at

W

a

nt

he is reto ofe as a will, and not merely as an inftrument of revocation (e).

fumes that to have been intended which the general dictates of nature would inspire, it stops there; in favouring the claims of the child, it breaks not in upon the disposing right of the father: The presumption which it raises yields to circumstances indicative of a contrary intention, and efficiently operates only in those cases where no such circumstances occur.

- (c) See 1 vol. b. 1. c. 6. f. 19., in which the difference of opinion upon this point is stated.
- (d) It must also be a subsisting will at the time of the testator's death, Goodright v. Glazier, 4 Burr. 2512., unless the second will expressly revoke the first; for, in such case, the first will being once clearly revoked, nothing but a new will can set it up again. Burtenshaw v. Gilbert, Cow. 49.
- (e) Our author here refers to wills of real estate, in which a difference of solemnities is prescribed, as to a will which is to operate substantively, and a will which is merely to revoke a former. As to such points of difference, see I vol. b. I. c. 3. s. 10., and Onions v. Tryer, IP. Wms. 343.

SECTION II.

IN a devise of debts, the true distinction seems to be between a legacy in numeratis, and a specific legacy. For, in the first case, the legacy will remain, though it is devised out of debts paid in to the testator: But a specific legacy may be lost by being altered (1). And there is no soundation (2) for the difference taken in the books (3), between a voluntary and compulsory payment (f), for the latter might

(1) Pawlett's
Cafe, Raym.
Rep. 335.
Savile v.
Blackett,
1 P.Wms. 779.
Rider v.Wager,
2 P.Wms. 331.
Attorne;
General v.

Parkyn, Ambl. Rep. 566. Ashburner v. Macguire, 2 Bro. Ch. Rep. 108. (2) Orme v. Smith. 2 Vern. 681. Earl of Thomond v. Earl of Suffolk, 1 P.Wms. 464. Ford v. Fleming, 2 P.Wms. 469. Attorney-General v. Parkin, Ambl. Rep. 566. Ashburner v. Macguire, 2 Bro. Ch. Rep. 108. Badrick v. Stevens, 3 Bro. Ch. Rep. 431. (3) Crockatt v. Crockatt, 2 P.Wms. 164. Lawson v. Stitch, 1 Atk. 568. Partridge v. Partridge, Forrest. 228. See also Swinburne, part 7. s. 20. Drinkwater v. Falconer, 2 Vez. 624.

(f) Though the distinction between a voluntary and compulsory payment be exploded where the bequest is specific, yet the distinction has been allowed in some cases where the legacy was in numeratis, see Coleman v. Coleman, 2 Vez. Jun. 639.; and in some of the cases in which the distinction is denied, it has been held, that a payment of the debt, when voluntary or compulsory, shall not adeem a legacy in numeratis; Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 464. Ashton v. Ashton, 3 P. Wms. 384. Bronsdon v. Winter, Ambl. 57. Attorney-General v. Parkin, Ambl. 566. and in others, that a payment though voluntary, shall

V.

n

y

n

d

r

ıt

ne v.

it.

nd

ft

ne

e-

of

en

or

5;

4.

n-

ol.

y,

all

might be with an intent to fecure the legacy in all events.

fhall adeem the legacy, though in numeratis. Bradrick v. Stephens, 3 Brown's Ch. Rep. 431.

SECTION III.

AND regularly (g), if the legatory die before the testator, or before the condition upon which it is given be performed, or before the legacy be vested in interest

(g) The rule is properly flated as a general rule; for a bequest may be so specially framed as to prevent the death of the legatee operating a lapse of the legacy. See Sibly v. Cook, 3 Atk. 572. Sibthorpe v. Moxon, 3 Atk. 580. Bridge v. Abbott, 3 Bro. Ch. Rep. 224. Neither will the rule extend to a legacy to two or more; for though, by the civil law, there is no survivorship amongst legatees, Swinburne, part 1. s. 7., yet it is settled, that a legacy to two or more is not extinguished by the death of one, but will vest in the survivor. Northey v. Burbage, Gilb. Rep. 137. Buffar v. Bradford, 2 Atk. 220. Nor will the rule extend to those cases where the legacy is given over after the death of the first legatee; for, in such cases, the legatee in remainder shall have it immediately. 1 And. 33. pl. 82.

(1) Swinb.
part 1. f. 7, 4.
Stapleton v.
Cheales,
Gilb. Rep. 76.

(2) Burnett v. Holgrave, 1 Eq. Ca. Ab. 296, 297.

(3) Barlow v. Grant, 1Vera. 255. Nevill v. Nevill, 2Vern. 431. interest, the legacy is extinguished (1): Yet it is otherwise, when the legatee takes as nominee only (b), and the legacy is but the execution of a trust (2). So when the legacy is not conditional, but modal, as 20% devised to a boy to bind him apprentice, and he dies before he is bound, his executor or administrator shall have it; because the same is actually devised to him, and the act of God shall not take it out of him (3). So if it were devised to be paid him within six months after he shall have ferved his apprenticeship, the serving the apprenticeship is not a condition annexed to the legacy, but only an appointment

Miller v. Warren, 2Vern. 207. Perkins v. Micklethwaite, I P. Wms. 274. Willing v. Baine, 3 P. Wms. 113. Scoolding v. Green, Pre. Ch. 37. Hornsby v. Hornsby, Mosely, 319. Darrell v. Molesworth, 2 Vern. 378. Roden v. Smith, Ambl. 588. 3 Vez. Jun. 15. 16. Nor will a legacy lapse by death of legatee in testator's life-time, if he be to take as a trustee. See Oke v. Heath, I Vez 140. But see Eacles v. England, 2 Vern. 468., where the point is doubted. As to vested legacies, see the following section. As to the effect of a lapsed devise, see Fortescue's Rep. 182, 184. 2 Bla. Rep. 736. Andrews Rep.

(b) The case referred to, Burnett v. Holgrave, is considerably weakened, in point of authority, by the case of Oke v. Heath, 1Vez. 135.

when

1.

S

t

e

S

-

S

f

d

e

e

d

t

1-

is.

v.

h,

th

ke ee

15

C-

r-

p.

15

he

n

when it should be paid. And though a will is no deed, because a seal is not necessary to it (i), yet it may have the force and effect of a deed: And, therefore, if a person says in his will, "I forgive such a debt, or my executor shall not demand it," this is a discharge of the debt (j), though the debt or dies in the life of the testator (4). But, if a debt is mentioned to be devised to the debtor, without words of release or discharge of the debt, if the debtor died before the testator, that will be a lapsed legacy, and the debt will subsist. And, if the first clause in the will imports a devife only, and the latter claufe amounts to a release and discharge of the debt, the latter clause shall be coupled with the former, as to be ancillary and dependant upon it, viz. if the legacy took effect, then the executor to release, &c. (5).

(4) Sibthorpe
v. Moxom,
3 Atk. 580.
Toplis v. Baker,
E. Hil. T.
1789.
1 P. Wms. 86.
note (2),
Cox's Ede

fe, &c. (5). (5) Elliott v. Davenport,
1 P. Wms. 83. Toplis v. Baker, E. T., 1789.

(i) A will, as it cannot take effect in the life-time of the testator, cannot, though sealed and delivered, take effect as a deed. Elliott v. Davenport, I P. Wms. 83. but though a will and a deed cannot unite, yet an instrument, though called a deed and in the form of a deed, may be testamentary, Habergham v. Vincent, IVez. Jun. 235.

(j) That a parol declaration by the obligee may operate in equity as a release of a bond, see Weckett v. Raby, 3 Bro. P. C. 16.

SECTION IV.

BUT a legacy is an immediate duty, though payable in futuro, and is an interest vested (k), which shall go to the executor

(k) As if the legacy be to the legatee, payable to him at a certain age, and the legatee die before he attain fuch age, yet this is a vested and transmissible interest in the legatee; for it is debitum in presenti though solvendum in futuro; Cloberry's Case, 2 Vent. 342. 2 Ch. Ca. 155.; Collins v. Metcalfe, IVern. 462.; Gordon v. Raynes, 3 P. Wms. 138.; Anon. 2Vern. 199.; but the representative of the legatec must wait till the time at which the legacy is payable, unless the whole interest be given, Crickett v. Dolby, 3Vcz. Jun. 15. but if the legacy be to the legatee generally, at or when he attain fuch age, it will lapfe by the death of the legatee before fuch age; Cloberry's Case, 2 Vent. 342. Snell v. Dee, 2 Salk. 415. Onflow v. South, 1 Eq. Ca. Ab. 295, 296. And this diffinction, which is borrowed from the ecclefiaftical court, though denied by the Lord Keeper in Yates v. Fettiplace, 2 Vern. 417., appears to have been frequently recognized. See Dawson v. Killet, 1 Bro. Ch. Rep. 119. but does not prevail in the construction of devises of real estate, nor is to be extended or favoured in the construction of personal legacies, Machell v. Winter, 3 Vez. Jun. 544. If the legacy be made to carry interest, though the words "to be paid, or payable," are omitted, it is a vested and transmissible interest. Cave v. Cave, 2 Vern. 508. Cloberry's

executor or administrator of the legatee. So of a share of an intestate's estate, or a sum of money devised out of lands (1); for it is looked upon as a legacy, and depends merely on the will, and is governed by the ecclesiastical law, which is so; otherwise, where it depends upon a deed; for a trust is guided by the intent. And if a settlement is made, and lands charged with such a sum of money, as a will should declare; there the will would be but declarative, and not operative (1). And

(1) Lord Pawlett's Cafe, 2Ventr. 366, 367.

berry's Case, 2 Vent. 342. Ch. Ca. 155. Stapleton v. Cheales, 2Vent. 673. Hubert v. Parsons, 2 Vez. 263. Fonnereau v. Fonnereau, 3 Atk. 645. So if the bequest be to A. for life, and after the death of A. to B., the bequest to B. is vested upon the death of testator, and will not lapse by the death of B. in the life-time of A. Anon. 2 Vent. 347. Pinbury v. Elkin, 1 P. Wms. 566. Darrell v. Molesworth, 2 Vern. 378. Tunstall v. Brachen, Ambl. 167. Dawson v. Killett, 1 Bro. Ch. Rep. 119. Jeal v. Titchener, 4th July 1771. Clarke v. Ross, 22d November 1773; stated in a note to Dawson v. Killett. Barnes v. Allen, 1 Bro. Ch. Rep. 181. Monkhouse v. Holme, 1 Bro. Ch. Rep. 298.

⁽¹⁾ See Stapleton v. Cheales, Pre. Ch. 317., and b. 2. pt. 1. c. 8. f. 7. note (f).

(2) Snell v. Dee, 2 Salk. 415. Dawfon v. Killett, 1 Bro. Ch. Rep.

this is the true difference (2), (and not that which is laid down in some books,) that where the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the payment, it is a lapsed legacy: Otherwise, if the time be annexed only to the payment of it (m). So a contingency, as after the death of the first devisee without iffue living at his death, vests immediately, though not assignable over (n); for this is a near and common possibility. And where words refer to that which must needs happen, there shall be no contingency (3).

(3) Harvey v. there ihall be no contingency (3).
Afton.
2 Eq. Ca. Ab. 539. in a note. See Lord Douglas v. Chalmer, 2 Vez. Jun. 501.

(m) This difference does not hold as to legacies or portions charged on real estate; King v. Withers, Forrest. 122.; Pawlett v. Pawlett, I Vern. 204. 321.; Yates v. Fettiplace, 2 Vern. 417.; unless the time of payment be postponed for the convenience of the estate.

(n) That fuch an interest is, though not grantable at law, transmissible and devisable, see b. 1. c. 4. § 2.

SECTION V.

LASTLY, If a man devises specific legacies (o) and pecuniary legacies, and the estate falls short to answer the pecuniary

(o) "There are two kinds of gifts included under the description of specific legacies. First, when a particular chattel is specifically described and distinguished from all other things of the same kind: Secondly, something of a particular species which the executor may satisfy by delivering something of the same kind, as a horse, a diamond ring, &c. The first kind may be more properly called an individual legacy; and if the thing so bequeathed is not found among the testator's effects, it sails; (see Selwood v. Mildmay, 3 Vez. Jun. 310.;) or if given first to A. and then to B., they must divide it; or if it is disposed of in the life of the testator, it is an ademption of such legacy." See Lord Hardwicke, Purse v. Snaplin, 1 Atk. 416, 417. See also Domat, 2 vol. B. 4. tit. 2. § 11. 21.

As to what will be a fufficient description to render the legacy specific, it may be proper to observe, that our courts lean against considering legacies as specific, because of the consequences; per Lord Hardwicke, Ellis v. Walker, Ambl. 310.; but if the words are clearly indicative of an intention to separate the particular thing bequeathed from the general property of the testator, such intention shall prevail; therefore, though it be difficult to make pecuniary legacies specific, yet Vol. II.

Bb fuch

te

ary legacies, they shall abate in proportion (p); but nothing shall be abated from the specific

fuch there are, as a certain fum of money in a certain bag or chest; Lawson v. Stitch, 1 Atk. 508.; or the bequest of a sum of money in the hands of B.; Hinton v. Pinke, I P. Wms. 540.; or of 2000/. the balance due to testator from his partner on the last settlement between them, if the testator did not draw it out of trade before he died; Ellis v. Walker, Ambl. 310.; fo a bequest of a bond, or of testator's stock in a particular fund; Ashburner v. Macguire, 2 Bro. Ch. Rep. 108.; Ashton v. Ashton, Forrest. 152.; Avelyn v. Ward, I Vez. 425.; or a legacy to be paid out of the profits of a farm which the testator directed to be carried on; Maquet v. Maquet, 2 Bro. Ch. Rep. 125; and as the testator, having distinguished and separated a particular chattel or part of his property from the general bulk of it, will render the bequest of such particular chattel a specific legacy, so may the testator carve specific legacies out of fuch specific chattel; as where the testator gives part of the debt due to him from A., it will be a specific legacy; Heath v. Parry, 3 Atk. 103.; fo a bequest of part of testator's stock in a particular fund; Sleech v. Thoringdon, 2 Vez. 563.; and if the chattel fo parcelled out into feveral specific legacies prove deficient, the specific legatees, though not liable to abate with the general legatees, must abate proportionably among themselves; Sleech v. Thoringdon; as must specific legatees of distinct chattels on deficiency of general affets; Duke of Devon v. Atkins, 2 P. Wms. 382.; Long v. Short, I P. Wms. 403.; That evidence is admissible to shew the state of testator's property

specific legacies (1). And where one devises to his wife all his personal estate at W., this

(1) Sayer v. Sayer 2 Vern. 688. Brown v. Allen, 1 Vern. 31. Hern v. Meyrick 1 Salk. 416.

property at the time of making his will, see Selwood v. Mildmay, 3 Vez. Jun. 308.

With respect to Lord Hardwicke's second kind of specific legacies, where the executor may satisfy the legacy by delivering something of the same kind, the will being merely descriptive of the species and not of the individual thing, as an horse, &c. See Partridge v. Partridge, Forrest. 227., and Bransdon v. Winter, Ambl. 57.

p) And as all legatees are on a deficiency of affets to be paid in proportion, so if the executor pay one of the legatees, yet the rest shall make him refund in proportion; nay, if one of the legatees get a decree for his legacy and is paid, and afterwards the affets appear to have been originally deficient, yet the legatee who received shall refund; but if the executor had at first enough to pay all the legacies, and afterwards, by his wasting the affets, they become deficient, in such case the legatee who has received his legacy, shall not be compelled to refund, but shall retain the advantage of his legal diligence, which the other legatees neglected by not bringing their fuit in time before the wasting by the executor; whereas, if the other legatees had commenced their fuit before fuch waste committed, they might have met with the like fuccess; et vigitantibus non dormientibus jura subveniunt. Anon. I P. Wms. 495. Edwards v. Freeman, 2 P. Wms. 446.; Walcot v. Hall, 2 Bro. Ch. Rep. 305. But though a legatee who has received his legacy may, if the atlets were B b 2 originally

e

t

r

f

t

n

,

's

y

(2) Sayer v. Sayer 2 Vern. 688.

(2) Webb v Webb 2 Vern. 111.

W., this is a specific legacy, and is as if he had enumerated all the particulars there (2). So a specific legatee is not to abate in proportion with other legatees (q), where there is a deficiency to pay debts (3): Yet in any case, he cannot have more than the testator devised him, although the testator had not power over it. So when the testator doth bequeath any thing in fatisfaction or recompence of some injury by him done; this legacy is not to abate

originally deficient, be called upon by other legatees to refund, yet he is not bound to refund at the fuit of the executor, unless the payment by the executor was compulsory; Newman v. Barton, 2 Vern. 205.; or the deficiency created by debts which did not appear till after payment of the legacy; Nelthorp v. Hill, 1 Ch. Ca. 136.; but the executor will, in fuch case, be perfonally liable; Vintner v. Pix, I Ch. Rep. 71.; but if there be a deficiency to pay debts, a legatee who has received his legacy is, in all cases, liable to refund to creditors; Noel v. Robinson, I Vern. 94.; Hodges v. Waddington, 2 Vent. 360. Hardwicke v. Mynd, Austr. That a creditor is not liable to refund a Rep. 113. part of his debt received before bill filed, in order to come in pari passu with other creditors, see Lowthian v. Haffel, 4 Bro. 170.

(9) But specific legatees must abate proportionably amongst themselves if there be a deficiency of general affets, D. of Devon v. Atkins, 2 P.Wms. 381.

any more than a specific legacy: But if a man devises specific and pecuniary legacies, and afterwards says, that such pecuniary legacies should come out of all his personal estate, or words tantamount; or if there is no other personal estate than the specific legacies; they must be intended to be subject to the pecuniary legacies, otherwise he must mock the legatees (4). So a legacy devised to be paid in the sirst place, shall abate (r) if the legacies sall short (5). So a devise of 100l. per ann., to be set out by his executor, is not a specific legacy, but quantitatis (6).

(4)Sayer v.Sayer Pre. Ch. 393.

(5) Brown v. Allen, 1 Vern. 31.

(6) Hume v. Edwards,

3 Atk. 693. Lewen v. Lewen, a Vez. 417.

(r) See Lewen v. Lewen, 2Vez. 417., in which case Lord Hardwicke states, that he should have doubted the determination of Brown v. Allen, had the legacy been a provision for a wife.

e

1

.

it

15

v.

to

ly ral

y

PART II.

CHAP. I.

Of the Probate of Wills.

SECTION I.

BUT we cannot omit making some mention of executors and administrators, at least with respect to their office and duty. Executors and administrators differ in little else than in the manner of their constitution, their offices being almost exactly the same. And this consists chiefly in three things: 1st, the proving the will: 2dly, the payment of debts; and, 3dly, the making an account. As to the first, the ecclesiastical court is the proper place to try wills and to prove them, and the chancellor

cellor will not try them here (a). But although the probate of a testament of perfonals belongs only to the spiritual court; yet of lands, or such things as savour of the realty, it is otherwise; however, by agreement they may be proved there. And in some boroughs a devise of lands is, by custom, reputed a devise of chattels, and so proved before the ordinary, and after before the mayor in the hus-

(a) The probate of wills appears to have been antiently in the county courts, but the jurisdiction of the county court having been lost by non-usage, the spiritual court is the only court which, except by special custom, has now authority to receive the probate of wills. The seal of the ecclesiastical court is, therefore, conclusive evidence of the will; Chichester v. Phillips, Raym. 404. 407.; Noel v. Wells, I Sid. 359. But though courts of equity cannot decide upon the validity of a will, they may, in certain cases, affect a legacy or the residue with a trust, as where the legatee has obtained his legacy by fraud; or upon a promise to take as a trustee for another; see B. I. c. 2. § 3. note (u); or where the words of the will imply a trust of the residue for the next of kin; see B. 2. c. 5. § 3. note (k).

And it has never been thought, that courts of equity have, by declaring a trust, in any such cases, infringed upon the jurisdiction of the ecclesiastical courts; Marriott v. Marriott, 1 Str. 666., Gilb. Reports 203.

y

ì

(1) Netter v. Percival Brett, Cro. Car. 396. Godolphin's Orph. Leg. 58.

(2) Lady Chefter's Cafe, 1 Ventr. 207. (3) Lady Chefter's Cafe, 1 Ventr. 207. Partridge's Cafe 1 Salk. 552. Netter v. Brett, Cro. C. 396. (4) 2 Rolle's Ab. 315. pl. 1. tings (1). So the prerogative court of Canterbury is not to prove a will concerning the guardianship of a child, which is a thing conusable in chancery, and to be adjudged, whether it be devised pursuant to the statute (2). But they may prove a will which contains goods and lands (3); though formerly a prohibition used to go quoad the lands (4), for the spiritual court could not prove the will in part; for the will was the whole will, and not a part.

SECTION II.

BUT, as to executors, probate is not the matter, for he is executor notwith-flanding in our law, and may do all acts, except sustaining actions; in which case he must appear to the court judicially to be the executor (b) (1). Yet if he shews

(t) Wentw.Off.
of Ex. c 3.p. 33
Godolph. Orph.

L-g. p. 2. c. 20. Middleton's Cafe, 5 Rep. 28. a. Henstoe's Cafe, 9 Rep. 38. a. Parten's Cafe, 1 Mod. 213.

(b) Though an executor, before probate, cannot maintain

it to the court when he declares, it is sufficient, though it was proved after the action brought (2). And if one executor (c) proves the will, it suffices for all. Neither is the refusal before the ordinary any estoppel to administer afterwards

(1) 1 Rolle's
Ab. 917. pl. 2.
Duncomb v.
Walter,
1Ventr. 370.
Raym. 481.
Wankford v.
Wankford,
1Salk. 302, 303

maintain an action in right of his teflator, he may maintain an action in right of his possession of his testator's effects; Greysbrook v. Fox, Plowd. 281. a. As to the particular acts which an executor may do before probate, see Godolp. Orp. Leg. p. 2. c. 20., Wentw. Off. of Executor. An executor may also be sued before probate if he has administered the testator's effects; Parten's Case, 1 Mod. 213.; Bowers v. Cook, 5 Mod. 136, 137.; Went. Off. Ex. 36. An executor may also, before probate, be compelled to discover the personal estate of his testator, though a fuit be pending in the spiritual court respecting the validity of the will; Dulwich College v. Johnson, 2 Vern. 49.; whether the probate confer any particular authority on the executor. fee Allen v. Dundas, 3 Term Rep. 125.; in which case the Anon. Case in Comyns' Rep. 150., is particularly confidered and over-ruled.

(c) But if all the executors named in the will refuse to prove the will, they cannot afterwards administer, or act as executors, by force of the will; but they may afterwards prove the will; Plowd. 281., Hensloe's Case, 9 Rep. 37. b.; unless administration has been granted upon their first refusal; Wentw. Off. Ex. 38., Broker v. Charter, Cro. Eliz. 92. Owen 44.

when

(3) Pawlett v. Freak, Hard. 111. House v. Lord Petre, 1 Salk. 311.

when they please in our law (3): And we have no regard in this point to the eccle-siastical law, where a renunciation is peremptory (d). And if an executor dies, the executor of the executor shall be charged; for he is executor of course, if the will be proved, because there needs no new probate. But no one can prove the will but he who is named executor in the will, and therefore he must take administration with the will annexed, if the executor died before the probate (4); for administration is an act in pais, of which the spiritual court cannot take judicial notice.

(4) Wankford v. Wankford, 1 Salk. 309. 1 Roll. Ap. 907. pl. 10. Dyer 372. pl. 8.

(d) And, therefore, notwithstanding the refusal of an executor, administration cannot be granted to another in his life-time, should he be the surviving executor, until he be again cited, and have again resused; but if, when surviving executor, he do actually renounce, then administration to another will be good. House v. Lord Petre, I Salk. 311. Wankford v. Wankford, I Salk. 308.

SECTION III.

AND if a man makes his will, which is proved, the ordinary cannot change it, nor make another executor or administrator; because this was the testator's act. and he hath his authority immediately from the testator, and is like the bæres in the civil law, only he is to take nothing to his own use. Nor hath the ordinary any power to grant administration, but when the person deceased did die intestate. or that the executors either will not or cannot perform the office (e). For the executor is constituted by the testator himfelf, and by him thought fit, and the ordinary cannot adjudge him not to be fo upon a disability (f) by the canon law,

⁽e) And therefore a grant of the administration before the refusal by the executor is void. Abraham v. Cunningham, 1 Vent. 303. 2 Lev. 182. J. Jones, 72. 2 Mod. 146.

⁽f) As to what persons are incapable of being executors, see Godolph. Orph. Leg. part 2. c. 6. Wentw. Off. of Exec. p. 17.

(1) Rezv. Raynes 1 Salk. 299. Mills' Cale, Skin. 299. (2) Hills v. Mills 1 Salk. 36. (3) Wentw. Off. Exec. p. 39.

(4) Anon. 2 Ventr. 335.

as where he became a bankrupt (g); for that is not received here, but as far as admitted from time immemorial (1). Otherwise of a natural disability, as non compos, &c. (2). And if an executor (3) takes administration (b), or be once sworn, though he will not after administer, the ordinary cannot make any other (4); but it shall be accounted the testator's folly to make fuch an one executor as will not administer. And, after an executor has once administered, he cannot refuse; or else an executor might convert the goods to his own use, and then refuse, so that a man should never recover against him, which would be against reason: Where-

- (g) Though bankruptcy does not determine the legal right of the executor, the court of Chancery will, in order to protect the effects of the testator, appoint a receiver. Ex parte Ellis, t Atk. 101. And so it will also, if the executor appears to be wasting the estate, or be a person in doubtful circumstances; and, upon the application of a creditor, will secure the sund, though misconduct or insolvency be not imputable to the executor. See Strange v. Harris, 3 Bro, Ch. Rep. 365.
- (b) What shall be deemed such an administering by an executor, as will preclude his refusal to prove the will. See Wentw. Off. of Exec. p. 39.

fore

fore the ordinary ought, in such case, to compel him to prove the testament, under pain of excommunication, &c. (5).

Pc. (5). (5) Henfloe's Cafe, 9 Rep. 36 Parten's Cafe, a Mod. 213.

SECTION IV.

FOR the ordinary may make process against executors to prove their testament, and if they do not come, they shall be excommunicated; and if they come and resuse, the ordinary ought, in all that he can, to perform the will of the deceased (1). And if any legacy be lest him, he shall not reap the benefit of it, if, being duly admonished, he resuse the burthen (i). But the executors may pray time to advise, and the ordinary is to

(1) Godolph.
Orph. Leg.
part. 1. c. 20.
§ 2, 3, 6.
Wentw. Off.
Exec. 36, 37fee Read v.
Devayues,
3 Bro. C.R. 95.
Abbott v. Maffie
3Vez. 148.
Anon. Owen, 44e

(i) That is by the common law; for, by the civil law, an executor is entitled to his legacy, notwith-flanding he refuse to prove the will, Owen. 44.; and it has been held, that where an executor had shewn his intention to act in the execution of the will, but died before probate, that his representative should have the legacy, Harrison v. Rowley, 4 Vez. 212.

grant,

(3) Broker v. Charter, Cro. Eliz. 92.

(4) Slaughter v. Mar, 1 Salk, 42. H dge v. Clare, 4 Mod 15. See also Walker v. Woollafton, 2 P.Wms. 578.

grant, in the mean time, letters ad colligend' (3). So the ordinary may grant administration in the mean time, till the executors prove the will (k); as during absence beyond sea (4), minority (5), or pendente lite (1); and a caveat is only concilium, but not præceptum. And an administrator durante minori ætate may do all things that an executor may; and he has more than the custody, for he has the property (m). Yet his release is not good, but for fuch things as he ought to release; and he is only a curator in the civil law, which is in the nature of a bailiff in our

- (k) Temporary administration not being within the statute which prescribes to whom the administration shall be granted, the ordinary is not bound to grant them to the next of kin. Briers v. Goddard, Hob. 250. Thomas v. Butler, I Ventr. 219. As to the power of a temporary administrator, see Walker v. Woollaston, 2 P. Wms. 576., where the point is very fully difcuffed.
- (1) Whether administration could be granted pendente lite, appears to have been formerly doubted. Robin's Cafe, Moore, 636. But see Slaughter v. May, Salk. 42. Lutw. 242. 2 P. Wms. 583.
- (m) When such administration ceases, see Pigot's Case, 5 Rep. 29.

law,

th

ho

the

ter caf

Pio

tha

law, who hath no power over the estate, but only to sell bona peritura (5). And the court, ex officio, ought to take notice of the ecclesiastical law, when it is by that law determined.

(5) Lord Grandison v. Countess of Dover, Skin. 155.

SECTION V.

BUT when one dies intestate (n), the ordinary had formerly power to grant the administration to whom he

(n) By which must be intended, when one dies without having made a will, or without having named an executor; or, having named an executor, the person so named refuses to act; in all which cases, administration must be granted, with this difference, that, in the first, the administration is general; in the two latter, the administration is cum testamento unnexo. It appears, however, that, at a very early period, namely, by the statute of Westminster, the ordinary was bound to pay the debts of the intestate, so far as his goods would extend, in the same manner that executors were bound in case the deceased had left a will; a use more truly pious, (observes the learned commentator on our laws,) than any requiem or mass for his soul.

ee

t's

,

pleased

20

pleased (o). And, therefore, the ordinary might well make another, if the committee would not administer at all, or but in part; for he cannot compel one to administer; and then is the power of the first determined, as a man may revoke his letter of attorney: For as a former will may be revoked by a latter one, by the law of the church, â fortiori may letters of administration (p). And a power or authority is revocable, as an administration; because he has nothing to his own use: Otherwise of an interest certain. But mefne acts executed shall stand, viz. If the administration was once lawfully granted, though not perhaps where it was never good (q). Yet, even in the first

⁽o) As to the origin and extent of the ancient power of the ordinary in cases of intestacy, see 2 Bla. Com. c, 32. Henfloe's Cafe, 9 Rep. 36. b. Offley v. Beft, I Sid. 370.

⁽p) If the ordinary ever possessed this power, it must have been prior to the 31 Edw. 3. c. 11.; for it seems generally admitted, that an administration once regularly granted, and the administrator acting, or willing to act under it, cannot be revoked. See Godolphin's Orph. Leg. part 2. c. 31. par. 4.

⁽q) "Where there is a former administration regularly

V.

y

t-

n

e

IS

e

S

r

1-

n

1.

it

e

ft

er

n.

ft.

ist

ms

ju-

ng

n's

rly

first case, they may be avoided against creditors for covin, by the statute of 13 Eliz.

larly granted, all acts lawfully executed by the first administrator, as administrator, are good in law, and shall bind the next and succeeding administrators. For this reason it is, that if administration be granted to a stranger, and the next of kin sue to have it revoked, and the first administrator, (pendente lite,) during the fuit, fell the goods on purpose to defeat the second administrator, and then the first administration happens to be revoked, and the administration to be committed to another, in case the second administrator cannot recover these goods, or have any remedy, unless the first suit for granting the administration were by appeal annulled; in which case, all that the first administrator did was void, and the second administrator, in fuch case, may recover all the goods the first administrator fold. Again, if the first administration be conditionally granted, all the acts which the administrator doth before the breach of the condition are good; fo that the subsequent administrator cannot avoid any gifts or fales before fuch breach made by the faid former conditional administrator. But fuppose the bishop of a diocese doth, as he ought, grant letters of administration of the goods of an intestate, not having bona notabilia, to one, and the archbishop grant letters of administration of the same goods to another; in this case the effect of the first administration is fuspended, until the other be repealed by sentence. And if there be a will concealed, and thereupon administration is granted, after which it happens that the will is produced and proved; in this case the administration is determined, and all acts vacated which VOL. II. Cc

(1) Packman's C. fe, 6 Rep. 18. b. Cro. Eliz. 459

(2) Wentw. Off. Exec. 366. Swinb. part 6. § 3, 12. 1 Roll. Ab. 907. pl. 9.

(3)Offiey v. Best b. 1 Sid. 370.
Price v. Parker, 1 Lev. 157.

Eliz. (1). And if an administrator dies, his executors cannot meddle with his goods, but the ordinary must grant a new administration, &c. (2). And, upon letters of administration shewn, we must judge according to their law; for it shall be intended, that they would not grant it against law. But although, by the civil law, the administrator was accountable as fervant to the ordinary, and might be discharged by him, and a repeal might have been of the letters of administration at the ordinary's pleasure; yet, fince the statute 21 H. 8. cap. 5., the administration being duly committed by the ordinary, cannot now be repealed without cause, but a prohibition lies (3). So where at common law the ordinary was not compellable to grant administration at all, and also might grant it to whom they pleased; now they are compellable to grant it to the next of kin(r). Nor is administration

had been formerly done by such a surreptitious administrator." Godolph. part 2. c. 31. § 5. 0

M

to

W

or

(r) Though, by the statute of Westminster, "the goods of the intestate were made liable to the creditors of

ney, but is rather an office; and adminifirators

S

n

1

t

t

t

n

e

-

it

1-

d

;

0

1-

n

i-

he

ors

of

of the intestate for their joint and lawful demands, yet the residuum, after payment of debts, remained in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependants; and, therefore, the statute 31 Ed. 3. c. 11. provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing with regard to fuits, and to accounting, as executors appointed by will. This is the original of administrators as they at present stand, who are only the officers of the ordinary, appointed by him in pursuance of this statute, which fingles out the next and most lawful friend of the intestate, who is interpreted to be the next of blood, who is under no legal disability. The flatute 21 Hen. 8th, c. 5., enlarges a little more the power of the ecclefiaffical judge-." 2 Bla. Com. 495. In consequence of the above two statutes, 31 Edw. 3. c. 11., and 21 H. 8. c. 5., the ordinary is compellable,first, to grant administration of the goods and chattels of the wife to the husband, or his representatives; Johns v. Row, Cro. Car. 106.; Squib v. Wyn, I P. Wms. 382.; and in case of his death, he having furvived his wife, to his next of kin: And he is bound to grant administration of the husband's estate to the widow, or next of kin; but he may grant it to either, or both, at his discretion, Fawtry v. Fawtry, 1 Salk. 36. Cc 2 2dly, Among

strators are enabled to bring actions in their own name, and come in the place of executors,

2dly, Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases. 21 H. 8. c. 5.

3dly, That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians; Mentney v. Petty, Pre. Ch. 593.; Lloyd v. Tench, 2Vez. 215.; and not of the canonists, which the law of England adopts in the descent of real estates; because in the civil computation the intestate himself is the terminus a quo the several degrees are numbered, and not the common ancestor, according to the rule of the canonists: And, therefore, in the first place, the children, or, on failure of children, the parents of the deceased, are entitled to the administration; both which are, indeed, in the first degree; but with us the children are allowed the preference; then follow brothers, grandfathers; Blackborough v. Davis, I P. Wms. 40.; Woodroffe v. Wickworth, Pre. Ch. 527.; uncles, or nephews; Durant v. Prestwood, I Atk. 454.; who must, as equally near, take per capita, and not per stirpes; and the females of each class respectively; and, lastly, cousins.

4thly, The half-blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate, and only excluded from inheritance of land upon feodal reasons; therefore the brother of the half-blood shall exclude the uncle of the whole-blood; and the ordinary may grant administration to the sister e

b

16

tl

3

executors, as a new creature made by the statute; and therefore this office survives (4).

(4) Adams v. Buckland, 2 Vern. 514.

of the half, or the brother of the whole blood, at his discretion. Croke v. Watt, 2 Vern. 124. Show. P.C. 108.

d

f

e

d

h

ıl

e

-

1.

1,

d

of

e

f

5thly, If none of the kindred will take out adminifiration, a creditor may, by custom, do it. Blackborough v. Davis, 1 Salk. 38.

6thly, If the executor refuse, or die intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin. Pierce v. Parks, I Sid. 281. Thomas v. Butler, I Ventr. 219.

And, lastly, The ordinary may, in defect of all these, commit administration, as he might have done before the statute of Edward 3d, Plowd. 278. a., to fuch discreet person as he approves of, or may grant him letters ad colligendum bona defuneti, which neither makes him executor nor administrator, his only business being to keep the goods in his fafe custody; and to do other acts for the benefit of fuch as are entitled to the property of the deceased.—If a bastard, (who has no kindred, being nullius filius,) or any one elfe that has no kindred, dies intestate, and without wife or child, it has formerly been held, that the ordinary might feize his goods, and dispose of them in pious uses; but the usual course now is, for some one to procure letters patent, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown. Manning v. Napp, I Salk. 37. Jones v. Goodchild, 3 P. Wms. 33.

SECTION VI.

AND the civil law, with respect to successions, was anciently very various and perplexed, till by The Novel Constitutions 118. c. 1. it was settled and made plain: Whence the plan of the statute of distributions was taken (s) and penned by a civilian (t); and, except in some sew particular

(s) Sir Wm. Blackstone, 2 vol. c. 32., is of opinion, that from the near refemblance which the statute of distribution, 22 & 23 Car. 2. c. 10., bears to our ancient English law de rationabili parte bonorum, it ought to be confidered as little more than a reftoration, with fome refinements and regulations, of our old constitutional law, which has prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. He acknowledges, however, that the doctrine and limits of reprefentation, laid down in the statute of distribution, seem to have been principally borrowed from the civil law, whereby it will fometimes happen, that perfonal estates are divided per capita, and sometimes per stirpes; whereas the common law knows no other rule of fuccession but that per flirpes.

The occasion of making this statute of distribution was to put an end to the controversy betwixt the temporal

V.

S

e

f

-

r

t

h

t

٢

0

particular instances mentioned in the statute, is to be governed and construed by the

poral and spiritual courts, The ordinary before took bonds from the administrator to make distribution, and those bonds were at law adjudged void, and the administrator entitled to all the personal estate. Hughes and Hughes, Carter's Reports, 152., 1 Lev. 233. One died intestate, leaving a considerable personal estate, and a fon and a daughter; the fon administered, and the daughter contended for a share in the spiritual court, where it was thought an hardship that the son should have all, and yet the daughter was prohibited at law. However, this statute of distribution takes away the administrator's pretentions (which he before made with fuccess) of retaining the whole; for, by the statute 22 and 23 Car. 2. c. 10., it is enacted, that the furplufage of intestate's estates, except of seme coverts (which, by the 29 Car. 2. c. 3. f. 25., are declared not to be within the 22 and 23 Car. 2. c. 10.), shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow of the intestate, and the refidue in equal proportions to his children (in which description a posthumous child is included, Wallis v. Hodgson, 2 Atk. 115.); or, if dead, to their representatives, that is, their lineal descendants: If there are no children or legal representatives subfifting, then a moiety shall go to the widow, and a moiety to the next of kindred, in equal degree, and their representatives; if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed amongst the next of kin, in equal degree, and their representatives; but no representatives are admitted among collaterals.

the rules of the civil law, and not from the canon law. For the canon law, prohibiting

laterals, farther than the children of the intestate's brothers and fisters. Carter v. Crawley, Raym. Rep. 496. Pett v. Pett, I Ld. Raym. 571. The next of kindred here referred to are to be afcertained by the fame rules of confanguinity as those who are entitled to letters of administration; and therefore, by this statute, the mother, as well as the father, fucceeded to all the personal effects of their children who died intestate, or without wife or iffue, in exclusion of the other sons and daughters the brothers and fifters of the deceased; and fo the law still remains with respect to the father. But, by the flatute I Jac. 2. c. 17., if the father be dead, and any of the children die intestate, without wife or iffue, in the lifetime of the mother, she, and the other children, or their representatives, shall divide his effects in equal portions; fee 2 Bla. Com. c. 32.; and, for a more particular detail of the manner of distribution, see Lovelace on Wills, ch. 3. f. 2. But it may be material to remark, that by the 5th fection of 22 and 23 Car. 2. c. 10., any child, other than the heir at law, who shall have an estate by the fettlement of the intestate, or shall be advanced by the intestate, in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom fuch distribution shall be made, is excepted from such distribution. And it is also enacted, that if any child, other than the heir at law, who shall have any estate by settlement from the faid intestate, or shall be advanced by the faid intestate, in his lifetime, by portion not equal to the share which will be due to the other children by fuch distribution

hibiting marriage between relations (u) till after the fourth degree, that they might exclude

as aforefaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated. But the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate.

(t) Sir William Walker, 1 Lord Raymond 574:

(u) An elegant and philosophic historian (Mr. Hume, Hist. of England, 4 vol. p. 101. oct. ed.) remarks, "That the natural reason why marriages, within certain degrees, are prohibited by the civil law, and condemned by the moral fentiments of all nations, is derived from men's care to preferve purity of manners; while they reflect, that, if a commerce of love were authorized between near relations, the frequent opportunities of intimate conversation, especially during early youth, would introduce an univerfal diffoluteness and corruption. But as the cultoms of countries vary confiderably, and open an intercouse more or less restrained between different families, or between the feveral members of the same family, we find that the moral precept, varying with its cause, is susceptible, without any inconvenience, of very different latitude in the feveral ages and nations of the world. The extreme delicacy

(1) Mentney v. Petry, Pre. Ch. 593.

exclude as many as possible from the liberty of marriage within those degrees without a dispensation, reckon all in the direct ascending or descending lines, and those in the collateral line corresponding with them, to be but one degree (1). And, it is faid, the ecclefiaffical court very anciently made distribution of inteftates' estates long before the act of parliament, viz. of 22 Car. 2., nor were they prohibited till the reign of king James I. And the prohibition was grounded on the statute of 21 H. 8., which directs the ordinary to grant administration to the next of kin; for, when that was done, they had executed their authority. But where the words in the act of parliament are, " to

delicacy of the Greeks permitted no communication between perfons of different fexes, except where they lived under the same roof; and even the apartments of a step-mother and her daughter were almost as much thut up against visits from the husband's sons as against those from any stranger or more distant relation. Hence, in that nation, it was lawful for a man to marry not only his niece but his half sister by the father: A liberty unknown to the Romans and other nations, where a more open intercourse was authorized between the sexes." As to the degrees of kindred prohibited from intermarriage, see 2 Burn's Eccle. Laws, 407.

distribute according to the laws for that purpose, and rules in the act aforementioned;" the word "laws" must relate and be intended of ecclefiaftical laws, and the usage in the spiritual court before that time practifed. And there is no doubt now, that the half-blood shall have administration; even an alien of the half-blood is capable (2). As to the words in the act, providing that no representation be admitted amongst collaterals after brothers' and fisters' children, these are to be understood of the brothers and fisters of the intestate; for the intestate is the subject of the act, it is his estate, his wife, his children-And by the same reason his brother's children, he being plainly the correlative to all (3). But the statute being made upon a prefumption, that the intef- 1 L. Raym. tate intended to prefer the next of kin, when there is a refiduary legatee, that prefumption is taken away (4): And therefore he shall have the administration. whether affets or not.

(2) Crooke v. Watts, 2 Vern. 124. Show, Parl. Ca. 108. and the cases there cited-

ley, Raym. Rep. 496. 1 Sid. 281.

(4) Thomas v. Butler, 1 Ventr. 219. Pierce v. Parks,

(3) Pett v. Pett, 571. Comyns' Rep. 87. 1 P.Wms. 25. Bowers v. Littlewood, 1 P. Wms. 594. Maw v. Harding, 2 Vern. 233. Carter v. Craw-

CHAP. II.

Of the Payment of Debts.

SECTION I.

BUT executors shall have only such chattels as the testator had to his own use (a). And regularly estates of inheritance, or of freehold descendible, shall go to the heir; and the statute of 29 Car. 2. cap. 3., makes the estate pur auter vie assets, only to pay creditors (b), for it is still a freehold

- (a) As to what shall be deemed the personal estate of the testator, see 2 Bac. Ab. 418.
- (b) The statute of frauds makes an estate pur auter vie devisable; and enacts, that if it be not devised, and there be no special occupant, it shall devolve on the executors and administrators of the party that had the estate, and shall be personal assets in their hands: So that whether an estate pur auter vie, not devised, be real or personal assets, depends upon there being or not being a special occupant; see Westfarling v. Westfarling, 3 Atk. 466. Atkinson v. Baker, 4 Term Rep. 229. but Q. Whether an estate pur auter vie, though no special occupant were named, would not be held

freehold and not distributable (c). Yet whatever comes to the executors' hands, or they are intrusted with as executors (1), shall be affets at law (d). And legal affets, Graves v.

(1) Girling v. Lee, 1 Vern. 63. Powell, 2Vern. although 248. Anon. 2 Vern. 405.

Clutterbuck v. Smith, Pre. Ch. 127. Bickham v. Freeman, Pre. Ch. 136. Dethwicke v. Caravan, 1 Lev. 224. Burwell v. Corrant, Hard. 405. Lord Masham v. Harding, Bunb. 339. Blatch v. Wilder, 1 Atk. 420. Westfarling v. Westfarling, 3 Atk. 466.

held real affets if devised. As to terms attendants on the inheritance, fee page 118, 119.

- (c) Estates pur auter vie, in case there be no special occupant thereof, and not devised, are now, by 14 Geo. 2. chap. 20. f. g., after payment of debts, distributable in the fame manner as the perfonal estate of the testator or intestate.
- (d) The cases referred to in the margin proceeded upon the principle of law, that whatever the executor takes qua executor, or in respect of his executorship, shall be considered as legal affets. But there are cases, in which courts of equity, adverting to the circumstance of the devisee being a trustee of the real estate, as well as executor, have considered the real estate as a purely trust fund, distributable according to the principles of equity; which, aiming at equality, are favourable to equitable affets. Anon. 2 Vern. 133. Challis v. Casborn, Pre. Ch. 408. Chambers v. Harvest, Mosely, 123. Hall v. Kendall, Mosely, 328. Lewin v. Oakely, 2 Atk. 50. Batfon v. Lindegreen, 2 Bro. Ch. Rep. 94. And the circumstance of the devise not being to the executor expressly upon trust, or in trust, or as a trustee, will not vary the rule, if there be enough in the will to convert the executor into a trustee, as if the devise be to him and his heirs; for the money

(2) Wilfon v. Fielding,

although you cannot come at them without the affiftance of equity (e), shall be applied in a course of administration (2): Otherwise.

2 Vern. 763, 764. Cale of Sir Charles Cox's Creditors, 3 P. Wms. 342. 1 Rolle's Rep. 56.

> money could never be affets in the hands of the executor's heir, nor could the creditor even maintain his action against such heir. Silk v. Prime, I Bro. Ch. Rep. Appendix, p. 7. See also Newton v. Bennett, I Bro. Ch. Rep. 135., and Barker v. Boucher, there cited, 140. But, if the executor has a merely naked power to fell qua executor, quare, Whether the affets are legal or equitable? See Silk v. Prime, and Newton v. Bennett. It has, however, been determined, that where an estate descends to the heir, charged with the payment of debts, it will be legal affets. Fremoult v. Dedire, I P.Wms. 430. Plunkett v. Penson, 2 Atk. 290. The authority of those determinations is however materially weakened, if not destroyed by the decisions in Hargrave v. Tindal, July 9, 1753. I Brown's Ch. Rep. Appendix, p. 6. and in Batfon v. Lindegreen, 2 Bro. Ch. Rep. 94. So that every thing may be confidered as equitable affets, which the debtor has made fubject to his debts generally, and which, without his act, would not have been subject to his debts generally.

(e) Therefore, if a mere trust estate descend on the heir at law, though it may be necessary to come into equity to reduce it into possession, yet it will be confidered as legal, and not as equitable, affets, fuch truft estate being made affets, not by the act of the party but by statute. And if A. mortgage for years, and the reversion in see be in him, it will be legal affets. But an equity of redemption of a mortgage in fee, being a merely

Otherwise, where you raise assets where there were none in law (f). Yet, even there, real securities shall be first satisfied, and then the debts by bond and simple contract to be paid in average; for any other method would become impracticable. And the rule is, where there are legal and also equitable assets, the creditors, who will take their satisfaction out of the legal assets, shall have no benefit of the equitable assets, till the other creditors, who can only be paid out of those assets, have received out of them

merely equitable interest, and not made assets by any legislative provision, will, therefore, be considered as equitable assets. Plunkett v. Penson, 2 Atk. 294. So if a termor for years mortgage his term, the equity of redemption will be equitable assets. Case of Sir Charles Cox's Creditors, 3 P.Wms. 342. Hartwell v. Chitters, Ambl. 308.

(f) From the cases referred to in the preceding notes (d), (e), it may be collected, that assets are considered as equitable, either in respect of the intent of the testator, or of the nature of the testator's interest in the property. In the first case, as already observed, the charge upon the real estate must be for the payment of debts generally, and, in the latter case, the interest of the party in the property must be a purely equitable interest, and not made legal assets by any statute.

(8) Sheppard v. Kent, 2Vern. 435. Deg v. Deg, 2 P. Wms. 417. Haflewood v. Pope, 3 P. Wms. 323. Morrice v. Bp. of England, Forrest 220. (4) Newman v. Johnson,

an equal proportion of their respective debts (3); and wherever the testator's intent appears, the lands shall be liable. without express words, to the payment of his debts (4). And fo far are creditors favoured, that, if the profits will not raise the fum in a convenient time, they may fell (5).

1 Vern. 45.

Trott v. Vernon, Pre. Ch. 430. Beachcroft v. Beachcroft, 2 Vern. 690. Harris v. Ingledew, 3 P. Wms. 91. King v. King, 3 P. Wms. 358. Hatton v. Nichol, Forrest. 110.

Earl of Godolphin v. Penneck, 2 Vez. 271. Kidney v. Coussmaker, 2 Vez. Jun. 266. Kightley v. Kightley, 2 Vez. Jun. 328. Williams v. Chitty, 3 Vez. 545. Shallcrofs v. Finden, 3 Vez. 738.

(5) See b. 1. c. 6. § 18.

SECTION II.

THE course and order of payment of debts by an executor at law is, 1st (g), Debts due to the king upon record: 2dly, Judgments obtained in a course of justice in adversary suits against

(g) Our author has omitted to notice the right of the executor, in the first place, to pay funeral and testamentary charges. Wentw. Off. of Exec. ch. 12. p. 129. 2 Bla. Com. 511.

the

tl

de of

fo

B

no

the testator (b), although by mere confession, and without defence in any court of record (1); and, of two judgments, he who sues first must be preferred (2); but, before, it is at the election of the executor to pay which he will first, only a judgment in a foreign country (i), as France, is to be considered but as a simple contract (3); and a decree in this court (k)

(1) Wentw. Off, of Ex. ch. 12.
p. 131. 135.
Harrifon's Cafe, 5 Rep 28. b.
(2) Smailcomb
v. Crofs,
1Ld. Raym. 251

(3) Duplein v. De Roven, 2 Vern. 549.

- (b) It may be material to remark; that this priority does not extend to judgments obtained against or confessed by the executor, Off. of Ex. 137.; nor to judgments not docketted pursuant to the 4 & 5 W. & M. c. 20. Hickey v. Hayter, 6 Term Rep. 384.; nor will a judgment though docketted prevail against debts which, by particular statutes, are to be preferred to all others; as the forseitures for not burying in woollen, 30 Car. 2. c. 3.; money due from overseers of the poor, 17 G. 2. c. 38.; for letters to the post-office, 9 Anne, c. 10., and some others.
- (i) See Walker v. Witter, Doug. Rep. 1., where the point is fully confidered.
- (k) This is too generally stated; for though a final decree be equal to a judgment at law, in the course of administration of assets, see Darston v. E. of Orford, Pre. Ch. 188.; 3 P. Wms. 402.; Morrice v. Bank of England, Forrest. 217.; Smith v. Stiles, 2 Atk. 384. But an executor or administrator shall not be allowed for debts paid after a decree to account, Vol. II.

(4) Searle v. Lane 2 Vern. 89. Peploe v. Swinburn, Bunb. 48. Morrice v. Bank of England, Forreft. 217. Bishop v. Godfrey, Pre. Ch. 179. Darfton v. Earl of Orford, Pre. Ch. 188. 3 P. Wms. 402. in a note. (5) Searle v. Lane 2Vern. 88. (6) Wentw.Off. of Ex. 138. (7) Harrison's Case, 5 Rep. 28. b.

(8)Wentw. Off. of Ex. 141, 142

is equal to a judgment at law (4); but, if the decree passed by default, he may contest the realty of the debt (5): 3dly, Statutes or recognizances; and of these, whoever getteth first hold of the goods in execution shall be preferred; but, before, the executor may give preference to which he will (6); but neither of these, before they are broken, do take place of fpecialties (7); 4thly, Specialties by bond or bill; and of fuch specialties, that is to be preferred whose time of payment is already come, especially if it be demanded (8); but, in equal degree, he may pay himself first (1), and any stranger, notwithstanding

but in taking the account he has a right to stand in the place of creditors he has paid, Jones v. Jukes, 2 Vez. Jun. 518.; yet it is not equal to a judgment, so as to affect the lands of the debtor. Assley v. Powis, 1 Vez. 496. Bligh v. Earl of Darnley, 2 P. Wms. 621.

(1) In aquali jure potior est conditio possidentis, is the principle upon which the executor's right of retaining is founded, according to the opinion of some (vide Wentw. Off. of Exec. 142.): but, according to Sir William Blackstone, it is grounded upon this reason, that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his

f

e

f

d

0

g

ne

z. to

z.

he

ng

de

ir

n,

IT-

ye

in

nis

withstanding a verbal demand (m), if no suit be commenced; and if several suits are commenced, he who first hath judgment must be first satisfied. But between a debt by obligation, and a debt for rent, or damages upon a covenant broken, there seems to be no difference; that is a rent behind at the time of the testator's death. And if the testator died a sew days before the rent became due, it would not make it the executor's debt, for the rent issue from the profits. But if the lessor distrain for the rent arrear, the exe-

his own private capacity. 3 Bla. Com. p. 18. Yet one executor shall not be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree, but both shall be discharged in proportion. II Viner's Ab. tit. Exec. (D. 2.)

(m) It may be material to observe, that, of debts of record, the executor must take notice at his peril; Searle v. Lane, 2 Vern. 88.; but, as to debts due by bond, or other specialties, although the law requires that debts shall be paid according to their priority, yet it seems, that an executor may pay a debt on a simple contract before a specialty, if he have no notice of such specialty; for otherwise it might be in the power of the obligor to ruin the executor, by keeping his bond in his pocket until the executor had paid away all the affets in discharging simple contract debts. See Britton v. Bathurst, 3 Lev. 115.

Dd 2

cutor

cutor cannot plead fully administered, as if debt had been brought. Nor can the distress be taken after in execution upon a judgment or statute of the testator's, although replevied; because it is but in the case of a prisoner bailed, who is still in fome fort in custody of the law. Also, the land is chargeable with diffress from the very making of the leafe, and the rent is a debt of a real nature, and fo superior to personal debts; and they were found levant and couchant upon the lands; fo that if they had been an under-tenant's or stranger's cattle they might have been distrained (n). Lastly, assumptions (o) or promises before legacies, or the reasonable part of the wife or children, to which, by custom in some countries, they are entitled; for it concerns the foul of the testator to have all duties and debts to others, as

⁽n) See Wentworth's Office of Executor, where the law upon this is very ably stated.

⁽a) Among fimple contracts, SirWilliam Blackstone observes, that servants are, by some, with reason, preferred to any other; and so stood the ancient law, according to Bracton and Fleta, who reckon, among the first debts to be paid, servitia servientium, et stipendia famularum. 2 Com. 511.

alienum, fatisfied, before voluntary gifts or bequests (0). And legacies are gratuities and no duties, and therefore an action will not lie at common law for the recovery of a legacy (p). But legacies shall be paid, notwithstanding any covenant not actually broken; for a covenant is no duty till it is broken, and it shall be presumed it will not (10). Now what is said of the right method or order of payment of debts, discovereth how and by what means an executor may waste them; and so much he hath still in right, according to the rule, pro possessore habetur qui dolo vel injuria desiit possidere (11); and, therefore, he (11) Went. Off. has still the same advantage of preferring which creditor he will, in equal degree. as aforesaid. But if there be no particular motives from the nature of the debts or legacies, or the circumstances of the parties, in foro conscientiæ he ought to pay every one in proportion, and let the loss

(9) Wentw. Off. of Ex. 155.

(10) 1 Rolle's Abr. 928.

of Ex. 165.

⁽p) See Atkins v. Hill, Cowp. 284. Buller Ni. Pri. 131., in which it is held, that an action would lie upon promife by an executor to pay a legacy; but in Deeks v. Strutt, 5 Term Rep. 690., it was held, that fuch an action would not lie.

be equal. And so was the civil law, and the ancient law of this realm, excepto domini regis privilegio siat ubique defalcatio; and, by the law of God, they shall be bound to do what is most profitable for the soul of the testator.

SECTION III.

BUT the executor may retard one action (q), and confess judgment to another subsequent action, and, in some cases, is obliged to confess judgment for his own defence, and plead (r) such judgment

- (q) An executor may retard an action by legal delays, as imparlance and essoins, &c., to prefer one creditor before another; but he may not do it by false pleading of what lieth in his own knowledge; otherwise if a falsity lie not in his own knowledge, as non est factum testatoris. Parker v. Dee, 2 Ch. Ca. 200, 201.
- (r) If the executor do not plead a prior judgment, but allow the plaintiff in the depending action to obtain judgment by default, or otherwise, and there be no affects to satisfy the subsequent judgment, the execu-

ment to other actions then depending: Otherwise, if several actions should come to be tried at the same time, he might be doubly charged, and obliged to answer the value of the assets twice over. But a voluntary payment made after an original filed, or bill exhibited (s), shall not be al-

tor will, in an action on fuch judgment, suggesting a devastavit, be chargeable therewith. Rock v. Layton, I Ld. Raymond, 589. Skelton v. Hawlins, I Wils. 258.

(s) So held by Lord Keeper Wright, in Darston v. Earl of Orford, Pre. Ch. 188., upon the authority of several adjudged cases; Bright v. Woodward, I Vern. 369.; Joseph v. Mott, Pre. Ch. 79.; but the decree was reversed in the house of lords, principally because the debts were of equal degree: And a decree of the court of chancery cannot be pleaded at law to an action brought against an executor upon another debt of equal degree; fee 3 P. Wms. 401. (F). But though a decree cannot be pleaded at law, yet it is now fettled, that a decree in the court of chancery as to administration, is equal to a judgment at law. If, therefore, a decree have a real priority in point of time, and not by fiction and relation to the first day of term, it will be preferred in the order of payment to subsequent judgments; and the judgment-creditor will be restrained from proceeding at law against the executor. Morrice v. Bank of England, Forrest. 217.; see also Joseph v. Mott, Pre. Ch. 79.; Harding v. Edge, 1 Vern. 143.; Brooks v. Reynolds, I Bro. 183.; Martin v. Martin, 1 Vez. 211.

lowed.

(1) Goodfellow v. Burchett, 2 Vern 300. Waring v. Danvers, 1 P.Wms. 295. (2)Wentw. Off. of Ex. 144.

lowed. Yet even in the case of a voluntary payment, if the fuit at law be not by original, but for the purpose upon a latitat out of the king's bench, there a voluntary payment shall stand good, though after the action brought(1); for the latitat, supposing a trespass, gives no notice of a debt; and so of a subpæna out of the exchequer (2). But the bringing of a bill in equity is not stronger, nor can bind the affets more than the bringing of an original at law; and therefore a judgment confessed by the executor to a bond-creditor fuing at law (t) after the bill brought in this court by the plaintiff, who was also a bond-creditor, shall be allowed upon account (3). But a judgment voluntarily confessed by an executor, pend-

(3) Goodfellow v. Burchett, 2 Vern. 300.

> (t) It may be proper here to observe, that if the executor find the affairs of his testator so complicated as not to allow of his fafely administering his estate, he may inflitute a fuit against the creditors for the purpose of having their several claims arranged by the decree of the court. Buckle v. Atleo, 2 Vern. 37. But fuch bill will not entitle him to an injunction to restrain any creditor from proceeding against him at law; it being necessary for such purpose, that there be a suit or decree, by and on behalf of the creditors of the teffator.

ing a bill here, shall not be allowed upon an account of assets (4).

otherwale, if for lefs than the value; the furplus is affers in his hands. So if a fpe-

viled, and the legatee takes money in fa-

(4) Surrey v. Smalley, 1 Vern 457, 1 Eq. Ca. Ab. 240.

wasgelod SECTION IV. o mela

AND it is the duty of an executor to pay the testator's debts; therefore, if he pays them with his own money, &c. the testator becomes indebted to him in the like sum (1). For it is but reasonable, when a man pays money lawfully, that he should be paid again, and because the same hand is to pay and receive, so that he cannot have an action against himself for the debt; therefore he may retain (2) so much of testator's goods, and pay himself (u). So if an executor with his own money redeem a pledge of the testator's for the full value, the property is imme-

(1 Robinson v. Tonge, 3 P. Wms. 400. Briers v. Goddard, Heb. 250.

(2) Claydon v. Spenfer, Mo. 2.

diately

⁽u) For the fame reason, among debts of equal degree, an executor or administrator may retain the amount of his debt. Cock v. Goodsellow, 10 Mod. 496.

(3) Keilw. 63. Off. of Ex. 77. diately changed by the redemption, and it is not assets in his hands; for this seems a sort of selling it to himself (3): But otherwise, if for less than the value; the surplus is assets in his hands. So if a specific legacy, as three gowns, &c. is devised, and the legatee takes money in satisfaction of them; this amounts, first to a consent of the executor to the legacy, and then it is at the same instant a sale by the legatee to the executor for the money.

she fund (a per in is but no

CHAP. III.

medicate de making vi an accident

Of making an Account.

are to dian out to end to be to a

SECTION I.

DUT all equal laws of every well-go-D verned commonwealth have favoured the execution of testaments and last wills of men deceased, and have taken special care that they should not be frustrated. And furely, if it be agreeable to reason, that stewards, receivers, bailiffs, guardians, factors, and fuch as have to deal for other persons, should be accountable of their feveral offices, with greater reason may it be maintained, that an executor ought to be subject to account; for they for the most part have to deal for such as are living, who may have an eye to what they do: but an executor is intrusted for a dead person, who is totally ignorant of it, if his executor deal unjustly. Besides, from the care and caution that is taken. as well by the civil as the ecclefiaftical

law, in making inventories, we may learn the necessity of making of an account; for if executors were not accountable (a), the use of inventories were to little purpose. The end for which this account is required is, that the will may be fully accomplished; and therefore all that have interest are to be cited to be present at the making of it, as the creditors and legatees, otherwise the account shall not be prejudicial to them (1).

(1) Swindurne, part 6. § 17.

(a) The statute of H. 8. (21 H. 8. c. 1. § 4.) does not require the presence of all persons interested at the making of the inventory, but of two at the least; and provides for the absence of all persons interested, by requiring, in such case, the presence of two credible persons.

SECTION II.

AND if we respect what is to be performed by the executor, who maketh the account, he is not only to declare what goods and chattels belonging to the testator

1

testator (b) he hath received, and what debts and legacies he hath paid for the testator, and to make due proof of every payment, that is to fay, of leffer fums by his oath, and of greater fums by other proofs, fuch as the ordinary shall allow of; but also if any thing do remain of the faid goods and chattels, the funerals, together with the debts and legacies being fatisfied and discharged, the same ought to be employed and disposed of in pios usus (c). Neither ought the executor, by the ecclefiaftical law, to apply any part thereof to his own private use, more than is given him by the testator, or which the ordinary shall allow him for his labour, or for the like confideration, viz. honest, moderate, and not fumptuous expences, according to the condition of the perfon (1). And for strictness, no funeral charges are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees; but not for pall or ornaments (2). But, by the

(1) Swinburne, part 6 § 20.

(2) Shelly's Cafe
1 Salk. 296.

common

⁽b) As to what things are to be put in the inventory, see 4 Burn's Ecclesiastical Law, 253.

⁽c) This notion has been long exploded.

common law, although an executor was compellable to account before the ordinary, and fo was an administrator; yet the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor swear the truth of them (d). So it was if a creditor fued in

(d) It appears that executors and administrators were, by stat. Edward 3. bound to account before the ordinary; but the ordinary was to take the account as given in, for he could not oblige them to prove the items of it, or to swear to the truth of it. Neither could a creditor falfify such account in the ecclefiastical court, for his remedy was at common law; Bellamy v. Alden, Noy's Rep. 78.; but a legatee might falfify fuch account, as may the next of kin, fince the statute of distribution. Archbishop of Canterbury v. Wills, I Salk. 315. By the 21 H.8. c. 5. § 4., executors and administrators are, however, bound to deliver to the ordinary an inventory of the effects of the deceased, upon oath, if thereunto lawfully required. But the truth of this inventory cannot be controverted in the ecclefiastical court; Hinton v. Parker, 8 Mod. 168.; Catchfide v. Ovington, 3 Burr. 1922.; but see Swinb. pt. 6. § 20., who observes, that if, upon examination of the account, it doth appear, that the executor hath not dealt faithfully, the account is to be rejected. As to when an administrator is to account, the condition of administration-bonds, fince the statute of distribution, being, that he will account at a day certain, he must account accordingly, and that without citation or fuit; and this account must be in court;

V.

S

-

e

n

e

1

e

rs

e

as

e

r

-

ıt

e

1.

e

1.

d

-

t,

e

the ecclesiastical court; for he had a proper remedy at common law. But otherwise, if a legatee had sued for an account, or the next of kin, who is a legatee by the statute of 22 Car. 2. of distribution, for the legatee had no other remedy. Yet, in such case, if the executor would pay him, he could not sue further, for he had right done him, and the executor was not liable, but of necessity that right might be done (3).

(3) Archbishop of Canterbury v.Willis, 1 Salk. 216.

fee Archbishop of Canterbury v, Wills, 1 Salk. 316.; Greenfide v. Benson, 3 Atk. 248. The jurisdiction of the ecclefiaftical court, being fo evidently defective in the case of creditors, has rendered it necessary for them to refort to courts of equity, which not only require the executor or administrator to swear to his account, but also allow the creditor to contest it, and when the debt is established, if there be affets, decrees its payment. And as legatees are not entitled to payment of legacies until all debts are paid; and as the payment of debts cannot be enforced in the ecclefialtical court, it is now become the usual course for legatees to feek payment of their legacies by fuit in equity, as do also the next of kin for distribution of an intestate's estate, there being no words in the statute of distribution to exclude the jurisdiction of a court of equity in the case of an intestacy; Matthews v. Newby, I Vern. 134.; and the spiritual court not having jurisdiction in cases where there is a will, and the residue undisposed of. Petit v. Smith, 5 Mod. 247., Lord Raymond 86.; see also b. 4. part 1, c. 1. § 2.

SECTION III.

cincide at common lave. But ofner

the excletiallical count; for he had a pro-

N executor de son tort is, where a stranger assumes the office of an executor, by performing some acts (e) which are proper to an executor, as by paying himself or other creditors with the goods of the deceased, or by taking them into his possession (1); for he must not be his own carver, because of the great inconvenience and confusion that would ensue. if every creditor should strive to satisfy himself first. And he cannot take advantage of his own wrong, as to retain for his debt. But all lawful acts that a wrongdoer does are good (2). Yet regularly it cannot be faid administration, unless he does what an administrator ought to do; as by employing them for the testator's

part 6. 6 22. Godolp. part 2. c. 8. Wentw. Off. of Ex. 171. Read's Cafe, 5 Rep. 33. b.

(1) Swinburne,

(2)4 Rep. 30. b. Wentw. Off. of Ex. 179, 180.

> (e) Doing acts of necessity or humanity, as locking up the goods, or burying the deceased, or feeding his cattle, will not amount to fuch an intermeddling as will charge a man as executor of his own wrong; 2 Bla. Com. 507.; Godolp. pt. 2. c. 8. § 3. As to what intermeddling will fo charge a person, seeWentw. Off. of Ex. chap. 14.

use, for the good of his soul. And where there is one executor of right, who proves the will, another shall not be executor of his own wrong by construction of law (f). But if he claims in such case to be executor, there, because of such express administering as executor, he may be charged as executor of his own wrong, though there be another executor of right (3). In case of intestacy, there is this diversity taken, if H. gets goods of an intestate into his hands after administration is actually granted, it does not make him executor of his wrong (g): But if he gets the goods into his hands before, though

(3) Wentw. Off. of Ex. 175. Read's Cafe, 5 Rep. 33. b.

(f) Except where the goods taken by him never came to the executor, but were in a remote part; in which case, he becomes executor; for as it were mischievous to the executor if he should, by possession in law, cast upon him, stand chargeable with those goods in a remote place pursoined, as affets in his hands; so were it as mischievous to creditors, if neither executor by right, nor this stranger, as an executor by wrong, should stand liable to creditors for them. Off. of Ex. 175, 176.

(g) Unless the administration be obtained collusively, by means of the person having the goods; in which case, the 43 Eliz. ch. 8. charges the person having the goods, &c. of the intestate, as executor de son tort.

Vol. II.

Еe

admi-

administration be granted afterwards, yet he remains chargeable, as a wrongful executor; unless he delivers the goods over to the administrator before the action brought, and then he may plead plene administravit, and if he takes upon him to act as executor, he is chargeable at all events (4) (b).

(4) Anon. 1 Salk. 312.

(b) I cannot conclude this chapter, which treats upon a subject of the most extensive and important concern, without recommending to the reader to avail himself of the advantage which the learning and industry of Mr. Gwillim affords him in his new edition of Bacon's Abridgment,—title Executors and Administrators,

7.

t

r

1 e a

ts

il

1-

BOOK THE FIFTH.

Of Damages and Interest.

CHAP. I.

Their Nature.

SECTION I.

CINCE a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from the breach of them, we ought not to omit treating of these, and especially of interest, which is the most frequent of all, it being the common measure, where the contract is for money, though in its own nature more incertain than any other. But it is now fixed to a certain portion of the sum lent; for, to cut off the infinite variety of liquidations and law-fuits, which might be occasioned by

Ee2

by the non-payment of money, it was absolutely necessary to settle, by a law, an uniform reparation for all the forts of damages arifing thence (a). But there was, befides, a natural reason, which made this regulation as equitable as it was useful to the public; for the damages which proceed from other causes do all fpring from fome engagement, which points out the nature of the loss, if he fails to perform it, and determines precifely the quality of the reparation to be made. But, in the case of those who owe money, it is otherwise. And debtors being all obliged to one and the fame thing, the respective damages which the creditors may fuffer are accidents they could not foresee, nor are obliged to answer; so that

⁽a) Domat, from whom our author appears to have extracted the whole of this section, has, vol. 1. b. 3. tit. 5., most fully and ably considered the subject; and, as the disquisition would much exceed the province of a note, I must beg to recommend his observations to the perusal of those who wish for a more particular view of the reason of the difference stated between interest of money and other damages. The reader will also find himself highly gratified in extending his researches to the reasoning of Pothier upon the same subject. Traite des obligations, partie 1. ch. 2. art. 3.

they are all bound only to the fame reparation of damages; and this could not be made more just or more certain, than by fixing it at the value of the common profits that may be made of money by a lawful commerce (b). As for damages in

(b) Domat remarks, that "this has been done by comparing money, which makes the price of all things, to those things which produce naturally some profit; and by regulating the profits of a fum of money according to the profit that is made of a thing of like value; and feeing the most ordinary and natural profits are those which lands yield, the reparation of damages, which ought to be paid to creditors in fums of money, who are not paid at the time of payment, is estimated at the rate of the usual produce or revenue of a piece of land of the same value with the sum that is due." That the market-price of lands depends on the market-rate of interest, and that the market-rate of interest is materially influenced by the value of land, is certainly true; but I apprehend that it is not wholly and precifely determined by it. "The ordinary price of land, (fays Dr. Adam Smith, in his Wealth of Nations, a work of deservedly the highest reputation,) it is to be obferved, depends every where upon the ordinary market rate of interest. The person who has a capital, from which he wishes to derive a revenue, without taking the trouble to employ it himself, deliberates whether he should buy land with it, or lay it out at interest; the fuperior fecurity of land, together with fome other advantages, which almost every where attend upon this species of property, will generally dispose him to conin general, the measure of them is to be taken from the quality of the action, the cause, and the event (c). For, where there is any fraud or knavish dealing, the sentence ought to have the utmost extent

tent himself with a smaller revenue from land than what he might have by lending his money out at interest. These advantages are sufficient to compensate a certain difference of revenue, but they will compensate a certain difference only; and if the rent of land should fall short of the interest of money, by a greater difference, nobody would buy land, which would foon reduce its ordinary price; on the contrary, if the advantages should much more than compensate the difference, every body would buy land, which again would foon raise its ordinary price." B. 2. c. 4. Whence it appears, that the legal rate of interest should be something above what money would produce if laid out in land. With respect to the proportion which it ought to bear to the common profits of trade, to which our author, upon the authority of Domat, feems to think it ought to be equal, I shall again refer to Dr. Adam Smith: "Interest is the compensation which the borrower pays to the lender for the profit which he has an opportunity of making by the use of the money; part of that profit naturally belongs to the borrower, who runs the risk, and takes the trouble of employing it; and part to the lender, who affords him the opportunity of making this profit." B. 1. c. 6.

(c) Pothier has stated a variety of cases illustrative of this position; see also Domat, vol. 1. b. 3. tit. 5. s. 2.

that

that the rigour of the law can give it; because the knavery implies a will and intention to do all the hurt that was possible. But, where there was nothing unfair, we ought to distinguish the events ensuing from the fact, which are to be imputed to him as author of it, and such as flow from other causes (1); for the general rule is, that no man is to be answerable for accidents, except there be some fault on their part (2).

(1) Domat's Civ. Law, des Obligations, partie 1. c. 2. art. 3. (2) Domat's

Civ. Law, vol. 1, b. 1. tit. 1. § 3, 9.

SECTION II.

NOW, while the Roman commonwealth stood, no interest could be demanded for the debtor's delay of payment, unless fome advance was agreed upon by contract. But some lawyers having introduced a custom chiefly in matters of companies, the emperors enlarged it to all contracts bonæ fidei (1), without exception, (1) Die. lib. 20 as also to legacies and trusts. Yet in con- Cod. 11.52. tracts of rigorous right, there must always

tit. 32.

be an agreement in form, or nothing is due, though a process be entered. And thus it is plain, that interest was not esteemed by them as any natural produce, but given only in certain cases to recompence the delay of payment: Yet it seems, vicem fructuum sustinere, and is allowed in Chancery, not only upon a note payable upon demand (2), but even for demands due by covenant, notwithstanding the objection (d) that they were not liquidated, and

(2) Ofborn v. Hoffer, 6 Mod.

(d) Compensation for breach of covenant lying in damages, and interest not being recoverable, ratione damnorum, but only ratione detentionis debiti; Sweatland v. Squire, 2 Salk. 623.; the objection to the case referred to appears to me at least entitled to further confideration.

That interest is not allowed in equity, (though it may be allowed at law, in the shape of damages, see Eddowes v. Hopkins, Dougl. 361.) on book or simple contract debts, prior to the confirmation of the master's report of such debts, though the real estate be devised for payment of debts; see Dolman v. Pritman, 3 Ch. Rep. 36.; Barwell v. Parker, 2 Vez. 363.; Earl of Bath v. Earl of Bradsord, 2 Vez. 587.; Lloyd v. Williams, 2 Atk. 108.; Shirley v. Lord Ferrers, 1 Bro. Ch. Rep. 41.: But see Carr v. Countess of Burlington, 1 P.Wms. 228.; Maxwell v. Wettenhall, 2 P. Wms. 27. contra. and Craven v. Tickell, 1 Vez. Jun. 63. in which last case Lord Thurlow, C. stated it to be the constant practice

and found only in damages (3). However, a difference has been taken in case of goods fold and delivered between bare notes and penal fecurities; because in the former (4), the parties have not extended the bargain beyond the bare fum in the note; but in the latter, although there was a profit in the fale, yet the court will not disposses him of the security without a common amends, i. e. the common interest for the time of his forbearance: for the penalty is prefumed, without any agreement for that purpose, to be inserted for that end. But where excessive rates are allowed for the work, in respect of flow

(3) Parker v. Harvey, 14 Vin. Ab. 458. pl. 16.

(4) 2 Com. Dig. tit. Chancery. (3 § 4).

tice at law, either upon the contract or in damages, to give interest upon every debt detained. Whether the creation of a trust for such purpose by deed, or whether the nature of the fund, as a term will vary the rule, fee Shirley v. Lord Ferrers. That interest is not generally allowed on rents and profits, or on arrears of an annuity; fee Ferrers v. Ferrers, Forrest. 2, 3.; Micklethwaite v. Boatman, I Ch. Rep. 97.; Batten v. Earnly, 2 P. Wms. 163.; Drapers' Company v. Davis, 2 Atk. 211.; Sir John Robinson v. Cumming, 2 Atk. 411.; Tew v. Lord Winterton, I Vez. Jun. 451. That interest will be allowed on the arrears of an annuity, if secured by a recognizance, or other specialty; see Legat v. Sewel, Gilb. Rep. 142.; Newman v. Awling, 3 Atk. 579. That it will be allowed on judgment

(5) Duchefs of Mariborough v. Strong, 14 Vin. Ab. 458 pl. 11, 2 Bro. P. C.

(6) Hale v. Thomas, vern. 349. flow payments, there shall be no interest allowed; for interest is only allowed to supply the want of prompt payment (5). And whenever the debt is carried beyond the penalty of the security, it is always for a desendant, upon the maxim that he who will have equity must do it; as where the party has been delayed by injunction of this court (6), or the like (e). But never for a plaintiss, any further than he could charge him at law; because he has chosen his own security, and therefore must abide by it.

Be-

ment debts, see Parker v. Harvey, 14 Vin. Ab. 458. pl. 15. 3 Bro. P. C. 187.; or on simple contract debts, &c. from the time of confirming the master's report, if there be much delay, see Shirley v. Ferrers, 1 Bro. Ch. Rep. 41. But see Cruse v. Lowth, 2 Vez. Jun. 157. where the subject is very fully considered, and it is determined that neither the judgment unless sounded on a debt in a penalty, nor a demand sound by the master's report, though confirmed, shall carry interest, except under particular circumstances. That in some cases interest will be allowed on children's portions before they are payable, see Greenhill v. Waldoe, Pre. Ch. 367.; Beale v. Beale, Pre. Ch. 405.

(e) As where an estate be devised in trust for creditors, and the trustee neglects to pay in a reasonable time; Anon. I Salk. 154.; or the obligee has obtained

Besides, a man can have no more than his debt, and the penalty is the utmost of the debt (7). Nor will equity ever carry interest beyond the penalty, where there has been no demand of several years (8). But, where a bond is only a collateral security, interest may be carried beyond the penalty (9). And so where advantage is made of the money, interest shall be carried beyond the principal (10).

P. C. 275. (9) Kirwin v. Blake, 14 Vin. Ab. 460. pl. 4. 2 Bro. P. C. 233. (10) Lord Dunfany v. Plunkett, 14 Vin. Ab. 460. pl. 3. 2 Bro. P. C. 251.

tained a judgment for the penalty; Awdley v.—, Hard. 136.; Godfrey v. Watson, 3 Atk. 517. See also Duvall v. Price, Show. Parl. Ca. 15., and the cases referred to in marg. But, unless there be some special circumstances in the case, the rule stated by our author seems most agreeable to the current of authority. There are, however, cases in which the penalty has been exceeded, without special circumstances: See Elliott v. Davis, Bunb. 23.; Lord Lonsdale v. Church, 2 Term Rep. 388.

(7) Steward v. Rumball, 2Vern. 509. Jevan v. Bush, 1Vern. 342. Tew v. Ld. Winterton, 3 Bro. Ch. Rep. 492. Knight v. Maclean, 3 Bro. Ch. Rep. 496. (8) Mayor, &c. of Galway v. Russell, 14 Vin. Ab. pl. 2, 2 Bro.

SECTION III.

A S to the time when the interest shall commence, it feems regularly to begin from the delay of payment. civil law, if that which is due proceeds from a cause, which, in its own nature, produces no revenue, the interest of it will be due only after the debt has been demanded in a court of justice (1); but those who retain money in their hands, and convert it to their own use, without the confent of the owners, are bound to pay interest (f), although it be not demanded, as a punishment for their knavish And, in our law, if the dealing (2). legatee be of full age, he shall have interest only from the time of his demand after the year; for, no time of payment being appointed, it is not payable but upon demand (g). But, in the case of an infant.

(1) Domat's Civ. Law, vol. 1. b. 3. tit. 5. § 1, 5.

(2) Domat's Civ. Law, vol. 1. b. 3. tit. 5. § 1, 8.

- (f) Courts of Equity proceed upon this principle in charging executors and trustees with interest on trust property, see b. 2. c. 7. s. 6.
 - (g) The time of demand appears to have been formerly

infant, it is otherwise, because no laches can be imputed to him; and the law dispenses with the demand in his favour, because of the impotence and weakness

merly the time from which interest was to run; but this is irreconcilable with the later decisions, which have followed the diffinctions taken by Lord Maccleffield in Maxwell v. Wettenhall, 2 P.Wms. 26.; which are, if one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacies shall carry interest from the testator's death, because the land yields profits from that time; see Stonehouse v. Evelyn, 3 P.Wms. 253. But if a legacy be given, charged upon a dry reversion, here it shall carry interest only from a year after the death of the testator, a year being a convenient time for a fale. If a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year after the death of the testator; see Lloyd v. Williams. 2 Atk. 108.; Beckford v. Tobin, I Vez. 308.; Bilfon v. Saunders, Bunbury, 240. But, if the personal estate confist of mortgages carrying interest or stock yielding profit, it seems the legacy shall carry interest from the death of the testator.

If a legacy be brought into court, and the legatee have notice of it, so that it is his fault not to pray to have the money, or that the money should be laid out, the legatee, in such case, shall lose the interest from the time the money was brought into court; but, if the money was laid out, the legatee shall have the interest which it has yielded.

(3) Smell v. Dee, 2 Salk. 415. (4) Palmer v. Trevor, 1 Vern. 261.

(5) Jolliffe v. Crew, Pre. Ch. 161. Knapp v. Yowell, Pre. Ch. 11.

(6) Atkins v. Dawbury, Gilb. Rep. 88. s Eq. Ca. Ab. 46. pl. 9.

of his age (3). But where a certain legacy is left payable at a certain day, it must be paid with interest from the day (4); because it is the will of the testator that the executor should tender it: Yet some think even in that case, a legacy ought to carry interest but from the time of a demand made, though it is otherwise of a debt (5). But a prefent legacy charged upon a reversion, expectant upon an estate for life, shall carry interest from the death of the testator (b); and a demand would be fruitless, the legacy not being in the hands of the executor, but only charged on the reversion (6). But interest may sometimes commence even before the time of payment; as if a father limits or devises portions to his daughters or younger children, to be paid, or payable, at their respective ages of twentyone years, or any other certain time, without making any other provision for their maintenance in the mean time (i), and

dies

⁽h) Qu. See Maxwell v. Wettenhall, 2 P. Wms. 26.; but see also Lloyd v. Williams, 2 Atk. 108.

⁽i) That if the child be otherwise provided for, this court will not allow interest, see Long v. Long, in a note to Mitchell v. Bower, 3 Vez. 286.

1.

ł

t

)

a

2

dies; in this case they shall have interest for their portions from his death (7), till paid; because the father, if he had lived, was obliged, by the laws of God and Nature, to have provided for them (j): Otherwise, in case of such a provision by a stranger, who was under no such obligation; because it was a mere bounty in him, and therefore shall be carried no surther than he has appointed it (k).

- (7) Attorney General v. Thompson, Pre Ch. 337.
 A. on. 2 Ventr. 346. Green v. Belcher, 1 Atk. 507. Hearle v. Greenbank, 3 Atk. 716. Incledon v. Northcete, 3 Atk. 438. Greenhill v. Waldoe, Pre. Ch. 367.
- (j) The moral obligation of the father is not the only ground for this distinction; for though the father is under a moral obligation to provide for his illegitimate children, yet an illegitimate child is not allowed interest by way of maintenance before his legacy is payable; Beckford v. Tobin, I Vez. 310. but see Crickett v. Dolby, 3 Vez. 12. in which case the Master of the Rolls said, that a natural child was intitled to interest on a legacy; neither shall a grandchild; Butler v. Freeman, 3 Atk. 58.; Palmer v. Mason, I Atk. 505.; Haughton v. Harrison, 2 Atk. 329.; Crickett v. Dolby, 3 Vez. 10.
- (k) See Heath v. Perry, 2 Atk. 101. and the cases referred to by Mr. Sanders in a note.

SECTION IV.

(1) Cod. lib. 4. tit. 32, 28.

AND it has generally been laid down as a rule, both in the civil law and in Chancery (1), that interest should not be allowed upon interest. But this has fome exceptions: And, 1st, A mortgagee of mortgage forfeited shall have interest for his interest (1); at least as to so much interest as was reserved in the body of the mortgage deed, that shall be reckoned principal; for it being ascertained by the deed, an action of debt will lie for it; and, therefore, it is but reasonable that there should be damages given for the nonpayment of that money. And although it

(1) In I Ch. Ca. 258. it is noted, that, a little before Michaelmas term (1674), the Lord Keeper (Finch) declared it should be the rule, that a mortgagee whose mortgage was forfeited should have interest for his interest, and should only be accountable for what profits he should receive, and not for what he might have received, unless there were fraud; but this rule does not appear to have prevailed in any cafe, and is directly against the decision of many. Proctor v. Cooper, Pre. Ch. 116.

is objected, that, if this were to be established for a rule, every scrivener would referve all his interest half-yearly, from time to time, as long as the interest should be continued out upon fecurity, which would make all mortgages pay interest upon interest; yet it is certain there is a clear distinction between debt and damages, and it does not appear that any inconvenience will arise from this doctrine; it will only ferve to quicken men to pay their just debts (2). But where there was a deed to let the mortgagee into possession, and enlarge the time of redemption, in which deed was mentioned what was due for principal and interest, the interest then due shall not carry interest. there being no express agreement that such interest should carry interest, and the whole fum due being mentioned for another purpose (3). 2dly It is, without all queftion, that this rule does not extend to a third person, who pays interest for a debtor to his creditor; for the same, with respect to him, is a principal sum lent (1).

(2) Howard v. Harris, 1 Vern. 190. 124, 2 Ch. Ca. 147,

(3) Brown v. Birkham, 2 P.Wms. 652.

⁽¹⁾ So held for a furety paying debt for his principal; Morley v. Cleaves, 2 Keb. 376.; but, quære, Vol. II. F f whether

(4) Smith v.
Pemberton,
1 Ch. Ca. 67, 68.
Chamberlain v.
Chamberiain,
1 Ch. Ca. 258.
Gladman v.
Henghman,
2 Vern. 135.
(5) Porter v.
Hubbart,
3 Rep. Ch. 43.

And, therefore, it has always been the rule in Chancery (m), that the mortgagee affigning, the affignee should have interest for the interest then due(n); and so all money really paid by the affignee, that was due to the mortgagee, shall be principal to the affignee. But the account between the mortgagee and affignee is not to conclude the mortgagor, but the Master is to fee what was really due at the time of affignment, and whether he actually paid the money; for, if the affignment was colourable, it would be otherwise (4); and, therefore, some have thought (5) that interest should not be made principal, in fuch case, unless the mortgagor had joined in the affignment (o). 3dly, A flated

whether the rule extends to payment by a stranger, without the concurrence of the debtor?

- (m) This rule does not appear to have been generally known in the time of Lord Keeper North. See Larl of Macclesfield v. Fitton, 1 Vern. 169.
- (n) In the case of Montague v. Ratcliffe, 5th June, 1706, it was held, that the assignee of the first mortgage having notice of the second mortgage should not turn interest into principal.
 - (0) And fuch appears to be now the general rule, fubject,

stated (p) account ought to carry interest (6), especially in cases of mortgages, and more strongly when settled by a master of the court (q) pursuant to order (7); and so interest shall be decreed for the yearly balance of a renewing account (8).

1 P.Wms. 480. Brown v. Barkham, 1 P.Wms. 653. Neal v. Attorney General, Mosely, 246. After v. Powis, 1 Vez. 496. Bickham v. Cross, 2 Vez. 471.

(8) Ashton v. Smith, 14Vin. Ab. 458. pl. 14.

(6) Blaney v. Hendrick, s Bla. Rep. 761. Barwell v. Parker, s Vez. 365. (7) Butter v. Duncombe, a P.Wms. 453-Bacon v. Clarke General. Mofely.

fubject, however, to such distinctions as particular circumstances may require. Ashenhurst v. James, 3 Atk. 270.

- (p) This position is true as to accounts regularly stated by and between the parties, in which case there is an implied contract on the part of the debtor to pay; but does not extend to cases where there is no settlement or acknowledgment by the debtor. Boddam v. Riley, 2 Bro. Ch. Rep. 3.
- (q) The report of the Master will not, however, entitle the creditor, whether mortgagee or otherwise, to interest before it be confirmed; Kelly v. Lord Bellew, I Br. Pa. Ca. 202.; Attorney General v. Brewers' Company, I P. Wms. 377.; but, when confirmed, the whole amount will carry interest, though part of it be in respect of costs; Bickham v. Cross, 2Vez. 471.

r,

e-

ee

ie,

t-

ot

le,

Quare, Whether an infant mortgagee, being defendant, shall be charged with interest upon interest? See Bennett v. Edwards, 2 Vern. 392. Pow. on Mort. ch. 13.

SECTION V.

PUT it is faid that damages are in the power of the court; and, therefore, they usually order them as they fee convenient: As if lands are limited, upon failure of iffue male, to the daughters of the marriage, and their heirs, until the next remainder-man should pay them 3000/.; there being four daughters only who entered, the rents in this case shall not be applied, first, to pay interest, and then to fink the principal, as in case of a common mortgage, but with this variation, that the principal shall not be sunk till a third part is raifed above the interest, and so again, when another third part is raised (1). So an account ought to be taken, with an annual rest, each year's account to carry interest, in cases where it is of a trustee, who has paid off incumbrances with his own money, arrears of annuities, and old mortgages. On the other fide, where the case is very hard, as the principal fums paid for maintenance of younger children to the grandmother,

(1) Blagrave v. Clunn, 2Vern. 523. mother, being allowed in the House of Lords towards the finking of her jointure, the court here would not let them be applied at the time when they were paid, but in one entire fum at the end of the account, and fo struck off all the interest for above fixteen years, which came to more than the principal (2). So where, by marriage articles, the lady's father was to pay feveral fums at feveral times, for discharging the husband's incumbrances, he advances money to the fon-in-law, and maintains the wife and child for two years; fuch money allowed for maintenance shall be added to the foot of the account, and not carry interest (q) (3).

(2) Lady Dacres v. Shute, 1Vern. 160.

(4) Kirwan v. Biake, 2 Bro. P.C. 333

(q) The instances in which the court has exercised its discretion in allowing a greater or less rate of interest than 41. per cent. which is the usual allowance, are too many and various to allow of enumeration, Lewis v. Freke, 2 Vez. Jun. 507. The following instances may, however, serve as illustrative of the considerations by which this discretionary power is usually regulated. When interest is allowed upon a legacy, in respect of the fund upon which it is charged being productive, the rate of interest shall abase if the produce of the fund be not sufficient to answer the usual allowance. Stonehouse v. Evelyn, 3 P. Wms. 253.; Lord Trimlestown v. Colt, 1 Vez. 277. When a legacy is given with interest, the court distinguishes between interest,

from interest which is to be satisfied out of a money fund, the profits of a money fund being in general greater than the profits of land. Beckford v. Tobin, IVez. 311.; Moore v. Moore, 3 Atk. 402.; see also Guillam v. Holland, 2 Atk. 434. The court will also distinguish between the rate of interest charged by the contract of the parties, and the rate of interest to be charged on interest turned into principal, by the course of the court. Astley v. Powis, 1 Vez. 497.

With respect to the mode in which a court of equity will assess arising from a breach of covenant, &c., sometimes it will direct an issue quantum dumnificatus, and, in some cases, it will refer the consideration to a master. See Danton v. Stewart, 4th July 1786; see also decree in Cudd v. Rutter, as stated by Mr. Cox from the Register's Book, 1 P. Wms. 572.

SECTION VI.

As to the measure of the computation of the interest, it is to be observed, 1st, That contracts are to be adjudged according to the law of the place where such

fuch contracts are made (r), and therefore, in all cases, interest must be paid according

(r) This point is most elaborately investigated by Huber, Pralectiones, 2 tom. lib. 1. tit. 3. de conflictu kgum, who remarks, that though from the anciently almost universal jurisdiction of Rome, the Roman law does not touch upon the subject, yet the fundamental rules which must govern it are to be extracted from that fystem; by which it was held: "1. Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra. 2. Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum sive ad tempus ibi commorentur. 3. Rectores imperiorum id comiter agunt, ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur. Ex quo liquet hanc rem non ex fimplici jure civili, sed ex commodis & tacito populorum consensu effe petendam." That learned writer, having illustrated the above general rules by a variety of cases, proceeds, "Verum tamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Nam contraxiffe unufquifque in eo loco intelligitur, in quo ut folveret, se obligavit." Upon this exception to the above general rules, Lord Mansfield appears to have founded his decision in Robinson v. Bland, 2 Burr. 1077.; fee also Campbell v. French, 3 Vez. 323., and Hunter v. Potts, 4 Term. Rep. 182.; Alves v. Hodgson, 7 Term Rep. 242.

But it may be material to remark, that the above exception

cording to the law of the country where the debt was contracted (s), and not according

ception has not been allowed in cases to which it might feem immediately applicable; as in Stapleton v. Conway, 3 Atk. 727.; in which Lord Hardwicke is reported to have faid, that " if a contract is made in England for a mortgage of a plantation in the West Indies, no more than legal interest shall be paid upon such mortgage; and if, in fuch case, there is a covenant in the mortgage for payment of 8 per cent., it would be within the statute of usury, notwithstanding this is the rate of interest where the land lies." The objection which occurred in the above case is now indeed done away by stat. 14 Geo. 3. c. 79.: But the interference of the legislature for such purpose does of itself afford a degree of strength to the principle of the decision; for if fuch contract, having relation to the law of the country in which the property was fituate, was of itfelf valid, fuch legislative interference was unnecessary; and that it was unnecessary, I am aware, is the opinion of fome highly respectable authorities; but their opinion feems opposed by the judgment of B. R. in the case of Span v. Dewar, 3 Term Rep. 425.

It is also requisite, to give a binding force to a contract entered into in another country, that it does not violate the rights of persons not parties to it. " Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur prejudicium in jure sibi quæsito." Huber. Prælec. ubi supra. To this qualification of the rule may be referred those cases in which courts of justice resuse to enforce contracts entered into abroad, which, though

for (1). So where one living in England devifes

(1) Ekins v. Eaft India Company 1 P.Wms. 396. 2 Bro. P.C. 72.

Bodily v. Bellamy, 2 Burr. Rep. 1094.

though there valid, are either violatory of some moral duty, or inconfistent with a positive right derived to a third person, under the law of the country in which fuch inconfistent claim is fought to be made available; in which case the rule is " magis est in tali conflictu ut jus nostrum quam jus alienum servemus." Another exception to the general rule, that the law of the place in which the contract is made shall prevail, is drawn from the nature of immoveable property. "Fundamentum universæ hujus doctrinæ diximus esse, & tenemus, subjectionem hominum infra leges cujusque territorii quamdiu illic agunt, quæ facit, ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenit rebus immobilibus; quando illæ spectantur, non ut dependentes a libera dispositione cujusque patris familias, verum quatenus certæ notæ lege cujusque reipublicæ ubi sitæ funt, illis impressæ reperiuntur; hæ notæ manent indelebiles in ista republica quicquid aliarum civitatum leges aut privatorum dispositionis secus aut contra statuant; nec enim fine magna confusione præjudicioque reipublicæ ubi fitæ funt res foli, leges de illis latæ difpositionibus istis mutari possent." Hub. ubi supra. And accordingly we find that a disposition of land in England by a will made abroad, must, to be effective in England, have all the folemnities prescribed by the law of England. Coppin v. Coppin, 2 P. Wms. 293.; Alves v. Hodgson, 7 Term Rep. 241. But that money of a foreigner in the public funds is not distributa-

(2) Earl of Dungannon v. Hackett, 1 Eq. Ca. Ab. 288, 289. Phipps v. Earl of Anglesea, 1 P.Wms. 696. 5Vin. Ab. 209. pl. 88. Wallis v. Brightwell, 2 P.Wms, 88. Pierson v. Garnett, 2 Bro. C.R. 38. Malcolm v. Martin, 3 Bro. 50. Sanders v. Drake 2 Atk 464. Boddam v. Riley 2 Bro. 2. (3) Walker v. Penry, a Vern. 42, 78, 145.

devises a rent-charge out of his estate in Ireland, it shall be reckoned according to the English value, the will being made here. So Turkish and India Interest is allowed upon contracts made there, though both parties have been long in England. Yet it is but reasonable, where the money is to be paid here, that the party should have an allowance for the return of it (2). 2dly, The statute in 1660 respects only subsequent contracts; so that if a mortgagor, before the statute, continues paying interest above 61. per centum, no indebitatus affumpsit will lie at law for the overplus (3); nor is there any just grounds to decree it in equity, it being voluntarily paid, and the contract not being changed or varied. But if the mortgagee enters, he shall be allowed interest, but after the reduced rate of 61. And fo it is agreed, that per centum.

ble according to the law of England, fee Thorne v. Watkins, 2 Vez. 35. and the cases there referred to.

(s) But the court will not decree interest upon interest, by reason of a custom in a foreign country in which the contract was entered into. Boddam v. Riley, 2 Bro. Ch. Rep. 3.

the

the statute of 12 Anne, cap. 16., which reduces the interest of money to 51. per centum, has no retrospect, but interest shall be paid, as it was at the time of the contract.

the field of the Ange, cap. 16. which incention intentition made, to 56. points and the intention of the intention of the call be pard, to be was at the time of the call be pard.

BOOK THE SIXTH.

Of Evidence.

CHAP. I.

Of Witnesses and Proofs.

SECTION I.

BUT as it is not fufficient to have a right in equity, unless we can make this appear by some outward proof to the court, in order to obtain relief, we must of necessity treat also of the qualification of witnesses, and the nature of evidence (a), less

(a) There is no branch of jurifprudence more interesting, and none more difficult of investigation, than the law of evidence. We have indeed several treatises upon the qualification of witnesses, the nature of the proof required, and the order of producing it; but those works, though valuable, are very far from perfect. Indeed the nature of the subject scarcely allows

lest our discourse should seem maimed and impersect. But we do not here intend

to

of its being refolved into fystem; we may collect and generalize the ideas which are to be found upon it; we may give them a degree of precision by rule, but cannot give to them that comprehension which is neceffary to fystem; and indeed, when we reflect that the evidence to be allowed by law should be suited to the habits, opinions, and the state of society, we cannot but expect its rules to vary with the varying exigencies of the subjects to which it is to accommodate itfelf: Thus we find that, as occasions have arisen in which the rigid application of the rule would have caused a failure of justice, the rule has given way to the occasion; for "all general rules touching the adminifiration of justice must be so understood as to be made consistent with the fundamental principles of justice, and confequently all cases, when a strict adherence to the rule would clash with those fundamental principles, are to be confidered as fo many exceptions to it." Fofter's Crown Law, 38., and as remarked by Sir Dudley Rider, in the case of Omichund v. Barker, 1 Atk. 29., if exceptions were not allowed to general rules in relation to evidence, it were better to demolish the general rules: General rules of evidence may therefore be confidered as afforded by the decisions of certain cases and entitled to govern all cases similar in circumstances; but, if other circumstances enter into the case, the principle of the rule must be consulted; and, if the principle does not reach fuch additional circumstance, it should feem that the rule ought not to be applied, if a failure of justice may be apprehended from its application.

to speak of these in general, but so far as they are used in this court (b). Now, in determining

(b) In confidering the authority of general rules, it is material to diffinguish those which are drawn from the depths of reason, and the strict observance of which is essential to the attainment of truth, from those which are founded on notions purely of convenience, and which may be considered as merely modal and assistant, rather than essential to such object; such are those general rules which respect the order of proceeding, &c.

Our author has flated fome general rules with reference to the qualification of witnesses; but it may be material to state, in addition to those which respect the qualification of the witnesses, those which respect the nature of their evidence, for though they are generally thrown together, I apprehend them to be in their nature extremely diffinct: Thus, when evidence is rejected as hearfay, it is rejected not on the ground of any disqualification in the witness, but that the nature of his testimony, though it be true, does not afford that degree of proof of which the fact may allow. The first general rule is, that you must give the best evidence that the nature of the thing is capable of: "The true meaning of this rule is, that no fuch evidence shall be brought that ex natura rei supposes still a greater evidence behind in the parties' possession or power, for fuch evidence is altogether infufficient, and proves nothing, as it carries a prefumption with it contrary to the intention for which it is produced; for if the other greater evidence did not make against the party, why did he not produce it to the court? as if a man offer a copy of a deed or will, where he ought to produce the original; this carries a prefumption with it, that

determining the qualifications of witnesses, equity follows the law (c); and it seems the

there is fomething more in the deed or will that makes against the party, or else he would have produced it, and therefore the proof of a copy in this case is not evidence; but if he prove the original deed or will in the hands of the adverse party, or to have been destroyed without his default, a copy will be admitted, because then such copy is the best evidence, the presumption of greater evidence behind in the parties' possession being overturned by positive proof." Buller's Ni. Pri. 293. Gilb. Law of Evid. 4. 5.

The next general rule is, that hearfay is no evidence, for no evidence is to be admitted but what is upon oath; and if the first speech were without oath, another oath that there was such speech makes it no more than a bare speaking, and so of no value in a court of justice; besides, if the witness be living, what he has been heard to say is not the best evidence. To this general rule, that hearfay is not allowed as evidence, there are several exceptions:

Ist, Though it is not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still consistent with himfelf; for such evidence is only in support of the witness that gives in his testimony upon oath. Gilb. L. of Evi. 150. Buller's Ni. Pri. 294.: But this evidence is said not to be evidence in chief, and that it is doubtful whether it is so in reply. Espinasse's Ni. Pri. 784.

adly, Where positive proof is not to be had, the declaration of persons uninterested, and who are then dead, are admissible, as in questions concerning legitimacy, the chancellor cannot do otherwise (1). And therefore if a man be rendered infamous

(1) Prac. Reg. 359. Manning v. Lechmere, 1 Atk. 453.

macy, or in questions of pedigree. Buller's Ni. Pri. 294,

3dly, Hearfay is good evidence to prove the death of any relation beyond fea. Buller's Ni. Pri. 294.

4thly, Hearfay is evidence in cases of settlement of paupers. See Espinasse's Ni. Pri. 785, and the cases there referred to.

5thly, Hearfay is evidence, whether parcel or not parcel. Davis v. Pearce, 2 Term Rep. 53.

6thly, In questions of prescription, hearfay is good evidence in order to prove a general reputation.

7thly, What commences by parol may be transmitted by parol, and that creates a general reputation, in which case hearsay is admissible evidence: and on this head M. Espinasse remarks, that it is in general to be observed, that it is no objection to the admission of hearsay evidence, that the party whose declarations are brought as hearsay evidence would not himself be an admissible witness, provided such declarations at the time were indifferent, and used with reference to the question then before the Court. Ni. Pri. 787.

The above exceptions to the general rule which excludes hearfay evidence, are ftrongly illustrative of the wisdom of our jurisprudence in making its rules subservient to the exigencies of occasion, in order to prevent a failure of justice.

The next general rule respecting what may be given in evidence is, that parol evidence, though not admissible to contradict a deed, is admissible to ex-Vol. II. famous in law, as by an infamous judgment (d), or has not discretion (e) and under-

plain a latent ambiguity in any instrument; see Lord Bacon's Max. Reg. 25, where this rule is fully considered, see also B. 1. c. 6. f. 11. note (z).

Another general rule is, that, in all cases where general character or behaviour is put in issue, evidence of particular sacts may be admitted, but not where it comes in collaterally. Esp. Ni. Pri. 788, and the cases there referred to. With respect to several other rules which are usually classed as general rules, they either respect the qualification of the witness, which will hereafter be considered, or the order of proof with reservence to the form of pleading; and therefore do not properly fall within the purpose of this note, which is merely to bring together such general rules as respect the nature of the evidence to be allowed.

(c) The position in practical register is, that all persons who are good witnesses at law, are so in equity; but this position by no means excludes the testimony of some persons to certain facts in a court of equity, which they would not be competent to prove in a court of law: thus an accounting party may in equity discharge himself by his own oath of small sums under 40s., provided they do not in the whole exceed the sum of 100l.; see margin (5) (6). Thus also a wise, plaintiss in a suit against her husband, may read the answer of her husband in support of her claim. The first instance is evidently sounded on the rule that he who seeks equity shall do equity, and the latter may be referred to the difference of the judicatures; a court

understanding, Cc. (f) his testimony is not to be admitted (2). And the objection

(2) Co. Lit. 6. Rex v. Davis, 5 Mod. 74.

of equity allowing the wife to fue her husband, which a court of law will not: But to allow her to fue her husband, and to exclude her from the benefit of his admission of facts which she might not be able otherwise to establish, were a mere mockery; she is therefore, when allowed to become a suitor against her husband, entitled to all the rights of any other suitor.

(d) It appears that formerly the infamy of the punishment was supposed to create the disqualification; but, according to the more correct and liberal conftruction of modern times, it is the infamy of the crime and not of the punishment which creates it, nam ex delicto non ex supplicio emergit infamia; and therefore perfons stigmatized by an infamous punishment, such as being fet in the pillory, are admissible witnesses, unless the punishment was inflicted for forgery, perjury, or any species of the crimen falfi, or any other crime of an infamous nature, or fo declared by positive law; for, fays Lord Chief Baron Gilbert, a man may be pilloried for speaking loofe and scandalous words of the government, which yet in doubtful and factious times ought not to be taken as a prefumption against his common credibility. Law of Evidence, 140, 141; Rex v. Crosby, I Salk. 689; Rex v. Ford, I Salk. 690.; Pendock v. Mackender, 2 Wilf. 18. By what means the competency of such a person may be restored, see Buller's Ni. Pri. 292, 8th ed.; see also Mr. Capel Loft's ed. of Gilb. Law of Evid. p. 257.

1

f

a

y

r

e

1-

e

e

rt

of

⁽e) This incapacity is either propter atatem aut prop-

tion that the party is concerned in interest, though never so small (g), have usually pre-

ter defectum rationis. The first species of incapacity applies to children, who, from the tenderness of their years are desective in their understanding, or insensible of the religious obligation of an oath. The latter species of incapacity applies to idiots and lunatics. As to idiots, whose unfortunate situation implies the total want of understanding a nativitate, their testimony is necessarily excluded in all cases. But with regard to lunatics, whose diseased state of mind allows of intervals of intelligence, it should seem too much to exclude their testimony during such intervals, respecting sacts which had occurred also during a lucid interval. See B. 1. c. 2. 1. 3. note (x).

(f) Or if he be an infidel, that is, if he possess no religion, for if he do profess areligion, however abfurd such religion may appear to us, yet as he attributes to it a facred influence and authority, it will bind his confcience to speak the truth, and therefore he shall be admitted as a witness, and sworn according to the ceremonies prescribed by fuch religion. There certainly are dicta in our books, whence it might be inferred that, by the ancient common law, all persons not professing Christianity are disqualified from being witnesses; but the numberless inconveniences, not to say the gross injustice which must have resulted from a rigid adherence to fuch a rule, necessarily compelled the adoption of the more liberal and enlarged policy which now prevails. But though infidels are, under certain circumftances, now allowed to be competent witnesses, persons excommunicated are faid to be disqualified; because, being excluded

prevailed (3), unless in special instances (b). As, 1st, for the necessity, where no other evidence

(3) Dodswell v. Nott, 2 Vern. 317.

excluded out of the church, they are supposed not to be under the influence of any religion. It were difficult to trace the origin of this disqualification; it appears to have prevailed in very early times, and even then referred to as an established rule; but whatever might be the motives from which this disqualification derived its origin, its prevalence at the present period, when one confiders the feveral causes of excommunication exclusively recited by the statute 5 Eliz. ch. 23., cannot but create surprise. Mr. Capel Loft, (Law of Evidence, 261,) enumerating fuch causes, observes, "the first is herefy; which, whatever it may mean, implies a fense of religious obligation and of conscientious acceptance of Christianity itself, as divinely revealed. How then does it presume a man to have no regard to the uttering an injurious falsehood in the prefence of the Deity, and, in repugnance to that religion, the truth and authority of whose general dostrines he admits? Another cause is, error in opinion in matters of religion and doctrine received and allowed in the church of England. Now, if the church of England were really infallible, it would be a misfortune to differ from her in any point, but certainly no ground of civil incapacity, especially to preclude a court of justice from being informed by a person labouring under that misfortune. Another cause is simony, which, as a corrupt trafficking, may indeed affect the credit of a witness, though the offence is conflituted fo strangely, that ecclesiastical right and wrong upon this subject enter commonly in a manner very perplexing to a lay imagination, should it attempt to define the principles of morality or fense

evidence could possibly be had; as where a man tears a note, or a goldsmith's apprentice

by which the boundaries have been settled: a remark not very dissimilar may be applied to usury. Incontinence, under which censure antinuptial commerce was till very lately included (27 G. 3. c. 44.), though the parties should have made the amende honorable by intermarrying, is another of the recited grounds of excommunication, as if being unguardedly awake to the impressions of nature demonstrated an insensibility to the voice of truth."

The stat. 3 Ja. 1. c. 5. having enacted, that every popish recusant should stand to all intents and purposes disabled, as a person lawfully excommunicated, it is said that they were also disqualified from being witnesses, Attorney General v. Grissith, 2 Buls. 155; a construction which a truly learned writer (Serjt. Hawkins) affirms to be "too severe, for this like all other penal statutes ought to be construed strictly, and the words thereof are no more than that such persons shall stand disabled, &c. as persons lawfully excommunicated, &c.; and, as the purport thereof may be fully satisfied by the disability to bring any action, it seems to be too rigorous to carry them any farther," Pleas of the Crown, B. 1. c. 12.

Another disqualification arises out of the relation in which persons may stand to the parties in the cause. This disqualification, by the civil law, involved various descriptions of persons, Cod. lib. 4-tit. 20., the reason of which is fully considered by Perezius Prælec, in Cod. lib. 4-tit. 20.; but which the

law

In odium spoliatoris, the oath of a party injured

law of England, reluctantly excluding the testimony of any persons to whose testimony credit might be safely given, confines to husband and wife, and counsel, and attornies.

The exclusion of the testimony of husband and wife, for or against each other, by the civil law, proceeded on the prefumption that their testimony could not be unbiaffed; but this confideration, though it may have influenced our adoption of the rule, is not the only one, the disqualification being principally (as remarks the learned commentator on our laws) " in respect of the union of person, and therefore if they were to be admitted to be witnesses for each other they would contradict one maxim of law, nemo in propria caufa testis effe debet; and if against each other, they would contradict another maxim, neme tenetur feipsum accusare," I Bla. Com. 443. " However there are some exceptions to this rule: First, in the case of high treason, it has been faid that a wife shall be admitted as a witness against her husband, because the tie of allegiance is more obligatory than any other: Secondly, by the 5th Geo. 2., the wife of a bankrupt may be examined by the commissioners, touching his estate, but not his bankruptcy: Thirdly, if a woman be taken away by force and married, she may be an evidence against her husband, indicted on the 3d Henry 7. 2. against the stealing of women; for a contract obtained by force has no obligation in law. So upon an indictment, on I Jac. 1. c. 11., for marrying a second wife, the first being alive, though the first cannot be a witness

(4) East India Company v. Evans, IVern. 308. injured shall be a good charge on him who did the wrong (4). 3dly, After a great length

yet the fecond may, the fecond marriage being void; and whether a wife de jure may not be a witness against her husband on an indictment for a personal tort done to herself, seems to be matter of doubt. In Lord Audley's cause she was allowed to be a witness to prove her husband affisted in a rape upon her; and though this case has been denied to be law, yet it was in cases where the indictment was not for a personal tort to the wife; and in the case of Azyre. on an indictment for the battery of the wife, Lord Raymond suffered the wife to give evidence; and the wife is always permitted to fwear the peace against her husband, and her affidavit has been admitted to be read on an application to the court of King's Bench, for an information against her husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a profecution upon, and not afterwards to be a witness at the trial: Fourthly, in an action between other parties, the wife may be a witness to charge her husband, ex. gr. to prove the goods for which the action is brought, fold on the credit of the husband; so perhaps in some cases in an action against her husband, though she will not be admitted to be a witness, yet a confession of her's may be given in evidence to charge him; as where an action was brought for nursing his child, the plaintiff was allowed to give in evidence that the wife declared the agreement to have been for fo much per week, because such matters are usually transacted by the women. It may be material to observe, that though this general disqualification equally applies

length of time; as in an account of twenty years standing, he may prove by oath

to proceedings in equity against husband and wife; Anon. 2 Ch. Ca. 39. Cole v. Grey, 2 Vern. 79. Wrottesly v. Bendish, 3 P. Wms. 238.; yet that it does not apply to fuits which they may institute against each other.-With respect to the exclusion of the testimony of counfel, &c. against their clients, this difqualification of the counfel, &c. is the privilege of the client, it being against the policy of justice to permit any person to betray a secret with which the law has intruffed him, Lindfay v. Talbot; T. 12 G. 1. Bull. Ni. Pri. 284.; fee also Sandford v. Kemington, 2 Vez. Jun. 189. But to this rule there are fome exceptions; first, as to what such persons knew before the retainer, for as to fuch matters, they are clearly in the fame fituation as any other person; secondly, to a fact of his own knowledge, and of which he might have had knowledge without being attorney or counfel in the cause, Buller's Ni. Pri. 284. For further qualifications of the above general rule, fee Espinasse's Ni. Pri. 718.

Informers though interested by the promised reward are competent witnesses, see Trials under the special commission of the rioters in 1780, where it was so adjudged.

(g) No rule can be more reasonable, in a general view, than that which requires the testimony by which any sact is to be established, to be free from that bias which an interest in the event might even imperceptibly give to the mind of the witness: But this rule, though so admirable in its principle, is perhaps, of all the rules of evidence, the most flexible in its application. The variety

(5) Holftcom v. Rivers, 1 Ch. Ca. 127-Peyton v. Green, 1 Ch. Rep. 78. oath what he cannot prove otherwise (5). 4thly, Of small sums in an account, as under

variety of influences to which the human mind is fubject, may be confidered as interests which it more or less anxiously consults. The voice of Nature may be fupposed to give a bias to the testimony of those who fland in the relation of blood; and, according to even the worldly construction of interest, the child is interested in preserving the character and defending the property of its parent; but it is a species of interest, which the law does not apprehend to be likely to fuperfede the rights of truth and justice, and therefore a child, by our law, may be a witness for or against his The habits of friendship may have so blended the claims of character, that the testimony of a friend may in some instances be considered as the testimony of a man on his own behalf, but the law does not reject fuch testimony; it may indeed, in such instances, be influenced by a more powerful motive than the prospect of acquiring or preferving wealth, but it is a confideration which does not disqualify the witness, however it may weigh in estimating his credit. What then, it may be asked, is intended by the interest which excludes the testimony of a man whose testimony is in other respects unimpeachable? It is a melancholy reflection that though the law of England conceives the claims of truth to be fufficiently strong to repress the feelings of nature, and the not less powerful dictates of friendship, it dare not trust the interests of justice to that species of influence which the smallest present actual or supposed pecuniary benefit may excite. not to arraign the wisdom or policy of the rule, I have already flated it to be of all the rules of evidence the most

under 40s., he shall be discharged by his oath, but he shall not charge another so.

And

most flexible in its application; that liberal spirit, which ever accompanies the truly enlightened mind, having modified its rigour by distinguishing that actual interest which goes to the competency of testimony, from that influence which merely affects the credit of it. See Abraham v. Bunn, 4 Burr. 2251.

With respect to what interest will disqualify, it seems that not only an actual but a supposed or expected interest will be sufficient, Fotheringham v. Greenwood, 1 Str. 129., not only an immediate, but an ultimate benefit, as if the party and witness claim under the same title or in the same right. To pursue the point would exceed the province of a note; I must beg therefore to refer to the several treatises upon the law of evidence, and the not less valuable chapters upon that subject which are to be found in our writers upon the law of Nisi Prius and Crown Law.

(b) The exceptions which our author has stated are those which most frequently occur in courts of equity, but they are by no means all the exceptions which have been allowed. For 1st, A party interested will be admitted as a witness in a criminal prosecution, in most instances, for the sake of public justice. 2dly, A party interested will be admitted for the sake of trade. 3dly, A party interested will be admitted where no other evidence is reasonably to be expected. 4thly, A party interested will be admitted where he acquires the interest by his own act, after the party who calls him as a witness has a right to his evidence. 5thly, A party interested will be admitted where the possibility of interested will be admitted where the possibility of interested will be admitted where the possibility of interested

(6) Anon. 1 Vern. 283. Marshfield v. Weston, 2Vern. 176. Everard v. Warren, 2 Ch. Ca. 249. (7) Stephens v. Gerrard, 1 Sid. 315. Callow v. Mince, Pre. Ch. 234. Goodtitle v. Welford, Dougl. Rep. 134. (8) Builer's Ni. Pri. 286. Bridgman v. Green, 2 Vez. 629. (9) Saville, 34. P1.81. 1 Mod. 11. 1 Sid. 441.

And this rule extends no further than for the fum of 100%, and he must mention to whom paid, for what, and when; for in an account he must prove the particulars (6). 5thly, Where he has released his interest, though the release was sealed in Court while the cause was trying (7). 6thly, Particeps criminis is admitted to prove matters of fraud, especially where what he proves is to his own prejudice (8). 7thly, If one be made a defendant by covin to take away his testimony (i), and it appears upon the evidence, the judges may and ought to allow him to be a witness (9). And this cannot be a general rule; but every case stands on its own circumstances, that is, whether their interest is so great as it may be presumed to make them partial, or not; and therefore

terest is very remote. See Buller's Ni. Pri. 288, 289, 290, where the above exceptions are stated and illustrated by cases. That a subscribing witness to a will under which he took no direct interest, but in the validity of which he afterwards became interested by marriage, with one of the devises is competent, see Brograve v. Winder, 2 Vez. Jun. 634.

(i) If a man unnecessarily makes any one a defendant, he thereby deprives himself of the benefit of such parties'

fore alms-people and fervants are good witnesses. So it is usual for a legatee of a small legacy (k), as 5s, to a private person, or 5l, to a nobleman, to be admitted a witness for the will (10).

(10) Corporation of Sutton-

Coldfield v. Wilson, 1 Vern. 254.

parties' evidence, for it is his own fault; but a co-defendant shall not be deprived of his evidence, for by such contrivance he might take off all the defendant's witnesses, Gibson v. Albert, 10 Mod. 19. Piddock v. Brown, 3 P. Wms. 288. See also Barrett v. Gore, 3 Atk. 401. Nightingale v. Dodd, Ambl. 583.

(k) See Stat. 25 Geo. 2. c. 6.

SECTION II.

As to the evidence, the usual course in Chancery is by depositions, for no witnesses vivâ voce are allowed at the hearing, except by special order (1). And there being the same question in both causes, and defendant's defence being the same, the depositions in a former cause shall

(1) 1 Harrison's Chancery, 598, 599. (2) Nevil v. Johnson, 2 Vern. 447. 1 Ch. Ca. 73. 2 Freem. 184.

(3) Christian v. Wren, Bunb. 321.

(4) Earl of Bath v. Batteriea, 5 Mod. 9.

(5) Coke v. Fountain, 1 Vern, 413. Earl of Peterborough v. Duch, of Norfolk, Pre. Ch. 212.

shall be read against him (2). But depofitions in another cause, in which the matters in question were not in iffue, shall not be read (3). So depositions taken in a fuit betwixt other persons are not to be given in evidence; for he had no opportunity to cross examine them (4). depositions taken in a cause; where the plaintiff's father was a party to the fuit, being in all matters the same, his father being only tenant for life, those depositions could not be read against him; for the advantage ought in all cases to be reciprocal (5). And where a cause is dismissed, the matter of it not being proper for equity to decree, yet the fact in this cause proved may be used as evidence between the same parties, whenever it shall come in question again. But when a cause is dismissed, not upon this ground, but for irregularity, fo that in truth there was never regularly any fuch cause in the court, and confequently no proofs, those proofs cannot be used: for proofs cannot be exemplified without bill and anfwer, nor can they be read at law, unless the bill upon which they were taken can be read (6). Laftly, No depositions ought

(6) Backhouse v. Middleton, 1 Ch. Ca. 175. to be allowed which were not taken in a court of record; and they are like examination of witnesses: So that although the defendant may read what part he will, yet the other side may read the whole afterwards (1) (7).

(7) Earl of Bath v. Battersea, 5 Mod.

(1) As to the course of proceedings in the examination of witnesses, see Gilbert's Forum Romanum, 122. Harrison's Chancery, 1 V. p. 462. 481. Hinde's Practice in Chancery, 422, and the Practical Register.

SECTION III.

AND although all exhibits proved by the depositions may be read at the hearing, yet they must be shewn forth in court, if the party will have any benefit of them (1); and parties and privies ought to shew the original deed (m); for every

(1) Harrison's Ch. 574-

(m) Deeds and copies of records not proved by depositions, may, by special order, be proved vivâ voce at the hearing, so far as respects the execution of them; but no examination is allowed to points that would

every deed ought to prove itself (n), or be

proved by others; but strangers to the deed, and who do nothing in right of the grantee, as bailiff or fervant, may plead the patent or deed, without shewing it. So a will, which is the plaintiff's title, must be shewn to the court itself, and not a copy (0) only (2): Otherwise, where it is by way of circumstance (3). But where a deed or other evidence is suppressed, the court will always intend a title against

(2) Rothwel v. Huffey, 2 Ch. Ca. 202. Pulefton v. Warburton, Comb. 395. (3) Eden v. Chalkile, 1 Keb. 117.

would admit of a cross examination; Earl of Pomfret v. Lord Windfor, 2 Vez. 480.; and therefore a will cannot be proved at the hearing vivâ voce; Harris v. Ingledew, 3 P. Wms. 93. Quare, If records themfelves may not be read at the hearing, without an order? Sawbridge v. Benton, Ex. M. 1793, MSS.

- (n) If the deed be thirty years old, it may be given in evidence without any proof of the execution of it; but fome account should be given of it, as where found, &c. and if any suspicion arise from any blemishes, rafure or interlineation, it ought to be proved, or the fufpicion in some manner done away, see Buller's Ni. Pri. 255.
- (o) This position is confined to wills of land; for, of wills of personal estate, the probate, if duly obtained, is conclusive evidence. King v. Raines, Skin. 583. Chichester v. Philips, Raym. 404. Noel v. Wells, I Sid. 359.

him

0

fe

fh

him that suppressed it (4). But a copy of a deed, supposed to be suppressed, is not allowed, unless examined (p), nor even upon affidavit that plaintiff had got it, but he shall be left to recover it at law (5). So although a recital of a leafe in a deed of release is good evidence of fuch leafe against the releasor, and those that claim under him; yet, as to others, it is not without proving there was fuch a deed, and that it was lost or destroyed (6). And, in case of an involment for safe custody, the deed may be faid to be recorded, yet a copy of it (7) is no evidence; nor is the inrolment itself without particular circumstances to support it, as proving that the original deed was in the defendant's custody or power, or accidentally lost, $\mathcal{C}_{c.}(q)$. But, where a bargain and fale is inrolled pursuant to the statute, the in-

(4) Lewis v. Lewis, Rep. Temp. Finch. 471. Eyton v. Eyton, 2 Vern. 380.

(5) Lord Peterborough v. Lord Mordaunt, 1 Mod. 94. 266.

(6) Ford v. Grey, 1 Salk. 285, 286. 6 Mod. 44.

(7) Lady Holcroft v. Smith, 2 Freem. 259.

- (p) Upon the same principle, the court will not allow the copy of a note of hand to be read, without being previously satisfied that the note was genuine. Goodier v. Lake, I Atk. 446.
- (q) In the case referred to, the position is thus qualified: "Otherwise than against the party who sealed it, and all claiming under him, and so far it shall."

Vol. II. Hh rolment

(8) Combe v. Spencer, 2Vern.

471.
Smartle v.
Williams,
1 Salk. 281.
3 Lev. 387.
6 Mod. 225.
Green v. Proud,
1 Mod. 117.
Olive v. Gwin,
Hard. 118.
2 Sid. 145.
(9) Dr. Ley-field's Cafe, 10 Rep. 92, 93.

rolment is a record; so that a copy of it may be read in evidence (r) (8); for no rasure or interlining shall be intended in a record for the height and solemnity of it; but the sure way is to exemplify it under the great seal, or at least under the seal of the court (s) (9).

- (r) This appears to have been the opinion of the Master of the Rolls; but, an issue having been directed, a copy of the involment was allowed in evidence by the Lord Chief Justice. See 2 Vern. 591. See Buller's Ni. Pri. 259, 260. where the case of Smartle v. Williams, is observed upon.
- ' (s) In Potts v. Durant, 3 Anstr. Rep. 789. an ancient writing purporting to be an infpeximus under the seal of the Bishop, was held to be inadmissible evidence, because it came out of private hands; but, query this determination, as there is no public repository for exemplifications, and, indeed, the very purpose of them, in general, requires them to be in private custody. But where there is a public repository for the particular instrument offered in evidence, its authenticity, in a great degree, depends upon its being found in the proper place, and therefore, it has been held, that a terrier cannot be received unless it came from the registry of the bishop, Atkyns v. Hatton, 2 Anstr. 386.; but it appears from a note to that case, that in Millerv. Foster, upon a motion for a new trial, the court of King's Bench thought that fuch evidence ought to have been received. See also Potts v. Durant, 3 Anstr. Rep. 795.

C

la

de

in ;

12

CHAP. II.

Of Averments and Parol Evidence.

SECTION I.

f

r

e

t,

y

of y.

ar

2

er er

of

it

r, g's

en

5.

RECORDS, when perfect, for avoiding infiniteness, which the law abhors, estop all parties and privies from contradicting any thing apparent in the record (1); and a record cannot be confessed and avoided, as to say, that he was not a person able (a), &c.; for then every record might be so avoided by a nude averment. But to take an averment which stands with the record, and which does not contradict any thing apparent in the record to the judges by construction of law upon the words, the law well admits and allows of (2). So a deed indented is the deed of both par-

(1) 1 Rolle's Abr. 862.

(2) 1 Rolle's Ab. 862. Com. Dig. Estoppel, (E. 3.) Co. Litt. 352. b.

(a) And therefore infancy cannot be averred at law in avoidance of a recovery or fine. Hungate's Case, 12 Rep. 122. 2 Inst. 483. But see b. 1. c. 2. § 5. note (d).

Hh 2

ties

(3) Co. Litt. 363. b. Shepherd's Touchtione, 52.

468

(4) Co. Litt. 363. b.

(5) Rolle's Ab. 872. 10Vin.Ab. 470.

(6) Weale v. Lower, Pollex. 67.

ties (3), though they were the words of but one; for both feal it, and of confequence are estopped by it (b), viz. in all the material and effential parts, without which it would not be good (c). Otherwife of a patent, or deed poll (4); because the estoppel there is not mutual, as it ought to be. But to a deed they may plead non est factum, & pari ratione may confess and avoid it, as by coverture or And although a deed is prima the like. facie, an estoppel, yet they may plead or aver any matter of fact which stands with the words of the deed (5). But no averment can be taken against the judgment of law, which appears to the judges upon view of the deed (6); for matter of fact is to be tried by the jury (d), but matter of law by the judges only.

- (b) Not if the deed be void at law, in respect of its consideration, as if it be usurious. 5 Rep. 69. b.
- (c) What are the effentials of a deed, see Touch-stone, 54.
- (d) That an ambiguity in a deed may be explained by usage, see Withnell v. Gartham, 6 Term Rep. 397.

I.

f

11

it

-

e

it

y

y

r

la

r

h

r-

nt

n

Et er

its

h-

ed

7.

SECTION II.

BUT, in case of estoppels, verdict against the truth, or the law being founded upon an untrue prefumption, Chancery will relieve. And although fuch affurances, as are used for the common repose of men's estates, equity will not draw in question; (for a fine with proclamations ought, after five years, to be a bar in conscience, as it is in law; so shall it be of a common recovery for docking the entail;) yet if a fine is unfairly obtained (d), equity will order a reconvey-

ance,

(d) Whether a fine may not at law be avoided by fraud, &c. Cruise on Fines, 311.

Courts of equity will interpose against the operation of a fine, not only on the ground of fraud, but also on the ground of lunacy; fee Rushtoy v. Mansfield, Toth. 42.; Addison v. Dawson, 2 Vern. 678.; so also of infancy in the cestuique trust; Allen v. Sayer, 2 Vern. 368.; fo also if the person levying the fine had notice of an existing charge upon the land; Drapers' Company v. Yardly, 2 Vern. 662.; fo if the fine be levied by a trustee; see case stated in Bovey v. Smith, I Vern. 149.; Shields v. Atkins, 3 Atk. 563.; Pomfret v. Lord Windsor, 2Vez. 482.; 2 Atk. 631.; or by mort-

(1) Wefby v.
Welby,
Toth. 99, 100.
Wright v. Booth
Toth. 101.
Barnefly v.
Powell,
1Vez. 289.
Will infon v.
Brayfield,
2Vern. 307.
Clark v. Ward,
Pre. Ch. 150.
(2) Sir John
Tuiner,
1Eq. Ca. Ab. 259

ance (1), and the court where it is acknowledged will vacate it for error, or irregularity (2). Neither is a judgment at law to be pleaded in bar to a fuit in equity, notwithstanding the statute of 4 H. 4. cap. 22.; because that statute meant only to restrain such jurisdiction as did take upon it to reverse the judgment, as error and attaint doth, which the Chancery never pretended to, but leaves the judgment in peace, and only meddles with the corrupt conscience of the party. And although it is faid, that the common law used some power to restrain such examinations directly before any statute made; yet these seem rather to examine the manner, than the very matter and substance of the thing adjudged (e).

gagor in possession; Focus v. Salisbury, Hard. 400, 402.; or mortgagee in possession; Weldon v. Dux Ebor, IVern. 132.; but see Lingard v. Grissin, 2Vern. 189. Nor shall a fine levied, in pursuance of a decree, be allowed to operate beyond the particular purpose for which it was directed to be levied. Goodrick v. Brown, 1 Ch. Ca. 49. 2 Vern. 56.

(e) See the jurisdiction of the court of Chancery vindicated, 1 Ch. Rep., where the point is very elaborately discussed.

SECTION III.

SO, in natural justice, deeds and writings are confidered only as memorials of the contract, not as a substantial part of them (1); and therefore any other (1) Grotius de proof is as well (f), and the estoppel will lib. 2. c. 16 \30. not in equity be regarded against the truth: As if a covenant be general, that he was lawfully feized, and there is proof that it was declared upon fealing, that he should undertake for his own act only, he shall be relieved (2). So if, in the pur- (2) Dr. Coldcott chase of a manor, a copyhold, being a little before escheated, was not intended to pass in demesne, and was left out of the particular; yet if the conveyance was fufficient to pass it at law, the vendor shall be relieved in equity (3). So where a lease for years was made in trustees, precedent to the wife's fettlement, only to

v. Hill, 1 Ch. Ca. 15.

(3) SirWm. Beversham's Case, 2 Vent. 345.

(f) This position is too general, nor do the cases referred to support it: I have, however, already had occasion to consider in what cases evidence may be given of matter not comprehended in a deed or other written instrument; see b. 1. c. 3. § 11. note (0).

protect

protect the wife's estate against the violence of the times, and not to exclude the husband, but the sequestrators; upon proof of this, by one single witness of

Book VI.

an undoubted reputation (g), the nature of the case requiring secrecy, Chancery will relieve against the trust expressed in the deed (4). And in case of a surrender made by a steward of a copyhold, if there be any mistake there, that is only

(4) Harvey v. Harvey, 2 Ch. Ca. 180.

(5) Towers v. Moor. 2Vern. 98. or uses (5).
Hill v. Wiggett, 2Vein. 547.

(g) The general rule is "that where the defendant in express terms negatives the allegations of the bill, and the evidence is only one person affirming what has been so negatived, that the court will neither make a decree nor send it to law," Pember v. Mathers, I Bro. Ch. Rep. 52.; Mortimer v. Orchard, 2 Vez. Jun. 243.; unless there be circumstances corroboratory of the testimony of the witness, seeWalton v. Hobbs, 2 Atk. 19. and the cases referred to by Mr. Sanders in his note.

matter of fact, and the courts at law will in that case admit an averment, that there was a mistake, &c. either as to the lands

SECTION IV.

AS for a testament proved fub sigillo episcopi, it is no estoppel: yet the last will of a man is looked upon as the last ferious act of his life, as to the disposition of his estate, and must be admitted sufficient to repeal all former wills, and much more to control all parol declarations. It is to be confidered, therefore, as it stands upon the will alone (g), and would have been fo, even before the making of the statute of frauds and perjuries; for, by the statute of wills, by which men are enabled to make wills, and devise their lands, it must be a will in writing, and should parol proof be admitted, it would introduce a mighty incertainty, and an infinite inconvenience.

⁽g) That parol evidence is, under some circumstances, admissible to convert a legatee into a trustee, see b. 2. c. 2. § 4. marg. (3).

SECTION V.

RUT this rule has received a distinction, which has greatly prevailed, viz. Between evidence offered to a court, and evidence offered to a jury; for, in the last case, no parol evidence is to be admitted, lest the jury might be inveigled by it; but, in the first, it can do no hurt, being to inform the conscience of the court. who cannot be biaffed (b) or prejudiced by it (1). And, therefore, though fuch an averment could not be admitted, where it was to make the party a title; yet, where it was only to rebut an equity, it might (i). As where A. charged his real estate with payment of his legacies and debts, and devifed his estate so charged to the defendant his nephew, and made the plaintiff his

(1) 1 Eq. Ca. Ab. 230. note(a)

⁽b) This distinction assumes more than general experience can warrant, and though it has occasionally been acted upon, the interests of justice would probably be more effectually secured, by excluding an impression which may be improper, than by trusting to the judge's power to control its influence, see Sandford v. Remingation, 2 Vez. Jun. 189.

⁽i) See cases referred to, b. 2. c. 5. § 3. marg. (6), and note (1), p. 131.

wife executrix: Proofs may be admitted, that it was A.'s intention that she should have the personal estate, clear of the debts; and if it were taken from her by the creditors, she should come in as a creditor on the real estate (2). So where a (2)Gainsborough money legacy, given to an executor, shall exclude him from the furplus, the prefumption being, that the testator did not intend him all and fome; yet fuch prefumption may be oufted or taken away by a proof of the testator's intention, that his executor should have the furplus, or that his next of kin should not have it (3), especially if a specific legacy were given to the next of kin; for one may aver the trust of a personal estate. So the construction of making a gift a satisfaction, has, in many cases, been carried too far: It is, therefore, reasonable, in such cases. to admit of parol proof as to the teftator's intention (4). However, the later resolu- (4) Cuthbert v. Peacock, tions have been very cautious of admitting 2Vero. 594. parol evidences, because they encourage fuits and litigations, and introduce the very mischiefs that the statute intended to prevent (5).

v. Gainsborough, 2Vern. 252.

(3) Bachelor v. Searle, 2 Vern. 736.

(5) See p. 135.

SECTION VI.

RUT although no proof ought to be received to fupply the words of a will, fince the will that must pass the land must be in writing, and must be determined only by what is contained in the written will (1); yet there can be no hurt in admitting collateral proof, to make certain the person or the thing described (2). As where A, devised to B, lands of 60%. per annum, paying 100/. which he by bond owed J. N.; it happened that the 100%. bond was not due to J. N., but to S. H.; but the person who drew the will having fwore, that the testator intended the debt to S. H., the devisee of the lands shall be liable. So to ascertain the thing, notwithstanding the statute of frauds (3); for it neither adds to nor alters the will, but only explains which of the meanings shall be taken. Yet some have doubted, whether they could read witnesses on a will of lands by the statute, though it were only in prefervation of the devise. But,

(1)Ld Cheney's Case, 5 Rep 68.

(2) Hodgfon v. Caldicott,
2 Vern. 593.
Utrich v.
Litchfield,
2 Atk. 373.
Fonnereau v.
Poyntz, 1 Bro.
Ch. Rep. 475.
See 1 vol.
p. 420. 108.
Mafters v.
Mafters,
1 P. Wms. 421.

(3) Pendleton v. Grant, EVern. 617. to be fure, if the devise would admit of any sense, they could not be read (i).

(i) "Mistakes (observes Lord Hardwicke) are never to be supposed, if any construction that is agreeable to reason can be found out." Purse v. Snaplin, 1 Atk. 415.

SECTION VII.

AND it is a fettled rule in the court of Chancery, that although they will read parol proof to fortify any natural construction that arises from the words of the will; yet they will never read any parol proof to make any alteration in the will, or addition to it (k). And if the bequest cannot be made out but by the parol disposition of the witnesses, there being only initial letters for the names of the legatees (1), as it is not substantive in writing,

⁽k) Unless fraud or mistake be imputed.

⁽¹⁾ That where a blank is added to a general legacy, no person is considered as referred to, see Hunt v. Hart, 2 Bro.

writing, it is not a written but nuncupative will, and, therefore, without the circumstances required by the statute, is void (1).

(1) Davis v. Glocester,

1 Eq. Ca. Ab. 403, 404.; but see Abbott v. Massie.

3 Bro. Ch. Rep. 311. and Attorney-General v. Baylis, 2 Atk. 239. But, quære, Whether parol evidence is not admissible to ascertain the person intended, if the name of the legatee be blindly written, or falsely spelt? See Masters v. Masters, 1 P.Wms. 425.

CHAP. III.

Of a Discovery.

SECTION I.

In the law of nature, when deeds and undeniable instruments cannot be produced (a), they must then give judgment according

(a) There is no branch of equitable jurisdiction of more extensive application than that which enforces discovery, and where kept within its due limits there is none more conducive to the claims of justice. To compel the defendants to discover that which may enable the plaintiff to substantiate a just or to repel an unjust demand, is merely affishing a right or preventing a wrong. But as the most valuable institutions are not exempt from abuse; so it may happen, that this power which ought to be the instrument of justice, may be rendered the instrument of oppression. A plaintiff, by his bill, may, without the least foundation, impute to the defendant the foulest frauds, or feek a discovery of transactions in which he has no real concern; and when the defendant has put in his answer, denying the frauds, or disclosing transactions, (the disclosure of which may materially prejudice his interest) the plaintiff dismisses his bill with costs, satisfied with the mischief he may have occasioned by the publicity of his charge.

according to the testimony of witnesses, or, with confent of the other party, give him his oath. I fay with the confent of the other party, for elfe, in the liberty of mature, no man is obliged to put the iffue of his cause upon another man's confcience. Though in the civil law, the judge ex officio, if he saw occasion, might put the defendant to his oath, or the party interested might demand it. this was decifive between the parties and their representatives, but did not hurt a third person (1). So in Chancery, though witnesses are examined, yet you may afterwards examine the defendant (b). And

(1) 1 Domat's Civil Law, B.3. Tit. 6. § 6.

> charge, or with the advantage which he may have obtained by an extorted disclosure. The rule which requires the fignature of counsel to every bill, affords every fecurity against such an abuse, which forensic experience and integrity can supply, but it cannot wholly prevent it. The court alone can counteract it; and in vindication of its process must feel the strongest inclination to interpose its authority.

> (b) Directions for such purpose are usual in decrees; but it is by no means true that after publication, or even after examination of witnesses, party may, as of course in equity, enforce from defendant a discovery of matter material to his cafe.

> > a bill

a bill lies there for the discovery of an estate by one who had a title to it; as by the patentee of the goods of a felon, or of one outlawed, for outlawry is in nature of a gift or judgment to the king (2). So where A. obtained judgment (2) The Protecagainst B., and the defendant to defraud ley, Hard. 22. him of the benefit of it, assigned his estate to trustees for himself. A. may have a discovery, though it is objected, that this is in the nature of a foreign attachment, and that there could not be a discovery of a man's personal estate in his life-time (3). But if the plaintiff in such case has not ivern. 399. taken out execution (c), it will not be allowed (4). And it feems agreed, it would not lie against the debtor himself, nor to have a general discovery from a third perfon (5), but only for particular things. So where a fire happens in a man's house, and burns his neighbour's likewise, although he is liable to damages at law, yet the plaintiff in fuch case shall not be affisted in equity; for though the law gives an action, yet it does not arise out of any con-

tor v. Ld. Lum-

(3) Swithier v. Lewis,

(3) Angel v. Draper, 1 Vern. 399. Shirley v. Watts 3 Atk. 200. Belch v. Wastall, 1 P.Wms. 444. (5) Utterfon v. Mair, 2Vez. jun. 95.

⁽c) Quare. Whether this rule extends to trust property?

(6) Morfe v. Buckworth, 2 Vern. 443.

(7) Heathcote, Bart. v. Fleete, 2 Vern. 442. tract or undertaking of the party (6). But the case is not parallel, where a lighter is overfet by negligence of the lighterman, or a ship takes fire by the negligence of the master or ship's crew, these come within the reason of any common carrier, and therefore he shall have a discovery to enable him to bring his action (7). Yet a plaintiff is not admitted to a discovery without verifying his title at law (c). So that if there be a full answer given to the thing in demand, till that be tried, the defendants are not bound to discover. As in a bill for tythes, if they plead the statute of 13 Eliz. cap. 20. against non-refidence in bar: Or in case of tithes of conies by custom, if they deny the custom. And the rather, because the demand was against common right, and if it should be

(c) This rule admits of several exceptions; as, if the plaintiff's interest in the subject be purely equitable, or though legal, it be obstructed by the fraud of desendant, or the plaintiff be a dowress praying an assignment of dower, Curtis v. Curtis, 3 Bro. Ch. Rep. 620. Mundy v. Mundy, 4 Bro. Ch. Rep. 294., or the bill be for an account of mesne profits accrued during infancy, or for a discovery of assets on behalf of a creditor, Thomas v. Williams, Bunb. 28., or to remove some impediment, or to obtain some evidence, without which the legal title cannot be made available.

otherwife,

otherwise, the defendant by a seigned suggestion might be forced to discover any thing (d). But if in that case, the matter be found against the desendant, he shall after be examined upon interrogatories. But where there is no such great inconvenience, as upon a bill against an executor to discover assets, he must answer, though he denies the debt, because it concerns the act of another (8).

(8) Randal v. Head, Hard, 188.

(d) The case referred to, has been often over-ruled, it being now held, that to a bill for tithes the defendant cannot protect himself from the discovery of the several matters alledged to be tithable, Gumley v. Fontlenoy, Bunb. 60., but he may by his answer insist on facts in bar of plaintiff's right, and have the same benefit from such insisting, as in other cases from a plea or demurrer.

SECTION II.

AS to the difference of the persons (e), for whom and against whom a discovery will be admitted, it is to be observed,

(e) The object of courts of equity in enforcing difcovery, being to possess the plaintiff, who appears to have a legal or equitable right, of that evidence which is necessary to enable him to make a legal or equitable right available, it may be easy to ascertain for what perfons a discovery will be enforced; but as it might be attended with extreme inconvenience, if, the plain. tiff having affumed a character which he did not fuftain, the defendant were compelled to afford the difcovery fought by the bill, the defendant may, by what is termed a negative plea, protect himself from making the discovery; see Mitford's Treatise, 188, 222. Hall v. Noyes, 3 Bro. Ch. Rep. 489. It may also happen, that though the plaintiff have a claim to the affiftance of the court in afferting his legal or equitable right, yet that the defendant has an equal claim to the protection of the court in defending his possession; in which case the court will not interpose on either side, Mitford's Treatife, 215. Such is the case of bona fide purchasers, &c. see sec. 3. It may also happen that the fituation of the defendant may render it improper for the court to enforce a discovery, as where the discovery might subject the defendant to pains and penalties, or to a forfeiture, or to fomething in nature of a forfeiture, or where the discovery would be a breach of professional

ferved, that perfons who claim lands by a will, or any other voluntary disposition, having the law on their side, are entitled as against an heir at law (f) to a discovery in equity of deeds relating to the estate, and to have them delivered up (g); otherwise

professional confidence reposed in defendant as counsel or attorney; see Mitsord's Treatise, 223, 224, to which very valuable work I wish to refer the reader for a clear and comprehensive view of the subject.

(f) And an heir at law, though not intitled to come into equity upon an ejectment bill for possession, yet he is intitled to come into equity to remove terms out of the way which would otherwise prevent his recovering possession at law, and has also a right to another relief before he has established his title at law; viz. that the deed and writ may be produced and lodged in proper hands for his inspection; for every heir at law has a right to a discovery by what means, and under what deed he is disinherited, Harrison v. Southcote, I Atk. 540. But see Lady Shaftsbury v. Arrowsmith, 4Vez. 66., in which case it was held, that the heir at law is not intitled to an inspection of deeds in the possession of the devises; but that an heir in tail is intitled to an inspection of the deeds creating the estate tail.

t

e

.

n

le

ıt

-

of

al

(g) As to the fecuring of title deeds, it feems that though primâ facie title deeds are properly to be entrusted with tenant for life; yet, fays Lord Hardwicke, it is the ordinary relief of the remainder-man to have the

(1) Duches of Newcattle v. L. Pelham, 8 Vin. Ab. 551. pl. 12.

(2) Andrews v. Powis, 8 Vin. Ab. 548. pl. 9. 2 Bro. P. C. 476.

otherwise the heir might defend himself at law by fetting up prior incumbrances, and by that means prevent the trying the validity of the will (1). So where a will concerning a personal estate is proved in the spiritual court, another having a former will in his favour may bring his bill to discover by what means the latter will was obtained, and to have an account of the personal estate, and whether the testator was not incapable and imposed on, though objected that it belonged to the spiritual court only to prove the validity of the will, and the former will was not proved in the spiritual court, as the will in his favour was (2). But if a bill is brought by a remote heir for a discovery of a title, and evidence, and to have terms removed, and the title at law cleared, this is one of the hard cases at law, where equity will not affift; for as equity will not relieve the children, should the re-

the title deeds taken care of against the tenant for life, Southby v. Southouse, 2 Vez. 612.; Ivie v. Ivie, 1 Atk. 430.; but this equity does not extend to a remote remainder-man, Ivie v. Ivie. As to the general doctrine, see Ford v. Peering, IVez. Jun. 72.

mote

mote heir recover, so neither will it assist the remote heir.

SECTION III.

AND purchasers shall not discover to impeach or weaken their title (g), for by this method all purchases might be blown up. As whether in a mortgage made by A. to B., which had been assign-

(g) It is certainly true, that "as a purchaser for valuable consideration has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to affert his right," a court of equity will not in general compel a purchaser for valuable consideration, without notice of plaintiff's title, to make any discovery which may affect his own title, Jerrard v. Sanders, 2Vez. Jun. 454.; but that such discovery will be enforced in favour of a dowress, see Williams v. Lamb, 3 Bro. Ch. Rep. 264.

As to what shall be considered a valuable consideration, see 2 Bla. Com. 297., and as to notice, see B. 2. c. 6. s. 2, 3, 4.; see also Mitsord's Treatise, 218.

ed to the defendant, there was not some trust declared for the benefit of the plaintiff, though plaintiff charged in his bill that fuch a leafe in defendant's cuftody mentioned it; for this is but a fide wind to make a purchaser expose his title, and the court will not do it (b), unless the plaintiff makes some proof towards falsifying his answer to induce them to it (1). So an affignee of a leafe shall not be forced to discover whether the lease was expired (i). So there is no reason to compel one whose land lies contiguous to mine, to discover the boundaries in his deeds; for that would be to help a man to evidence to evict another of his possesfion (2). And they will never help the

(1) Hall v. Atkinfon, 2 Vern. 463. fed qu.

(2) Hungerford v. Goring, 2Vern. 38.

- (b) It is observable that the reporter has subjoined a query to the case referred to, and indeed it seems difficult to support the decision with reference to the case stated.
- (i) But lessee for years of the conusor of a statute, has been compelled to discover what estate he had from the conusor, to the end that it might be liable to the statute, Titchburn v. Doddington, 8 Vin. Ab. 554. pl. 2.; and the mortgagee of an estate, partly settled and partly unsettled, must discover the boundaries, if required, by any person claiming under the settlement, Strode v. Blackburne, 3 Vez. 225.

iffue

iffue against a purchaser (3). But where it is a bounty, as a voluntary devise to the wife for life, in such case the heir having a good title, viz. as heir in tail to his great grandsather, or the like, shall be aided.

(3) Stapleton v. Sherrard, 1Vern, 212-Sherborne v. Clarke, 1Vern. 273-Kelly v. Berry, 2 Vern. 35-Bunce v. Philips 2Vern. 50-

SECTION IV.

BUT with respect to the personal estate there is a difference between contracts that are negotiable (k), and such as are

(k) Where from any vice in a fecurity negotiable at law, the holder of it cannot recover upon it at law, it is unnecessary for a court of equity to interpose, and therefore in Ryan v. Macmath, 3 Bro. Ch. Rep. 15, the court dismissed the bill, which prayed that the plaintiff's name might be struck out of a bill of exchange, he not being in partnership with the drawer at the time the bill was drawn; it being incumbent on the holder of the bill to prove the partnership upon the trial at law; but it may sometimes be necessary for the drawer or acceptor of the bill to come into equity for the purpose of obtaining a discovery of the considera-

(1) Gilb. Lex præ. 288, 289. (2) See B. 1. C. 5. § 1. p. 335. Brown v. Davis, 3Term Rep. 80.

are not (1), or where they are not negotiated in a mercantile way (2), where the note passes as ready money. As if it were assigned as a collateral security for a debt already contracted, for there, if the note was fraudulently obtained, or by gaming(1). he has no remedy against the drawer. But if he actually negotiates it for value, the indorfee shall in all events have his money of the drawer, though he has paid it before, or it was obtained by fraud; because the indorfee has a legal right to the note, and a legal remedy at law, which the court of equity ought not to take away from him, and it would be to the ruin of all commerce, if the original cause and confideration of fuch note should be inquired into (3). But the assignee of a

(a) Gilb. Lex præ. 288, 289.

> tion for, or manner in which fuch negotiable fecurity was obtained; and in such cases, if the objections are not available at law, equity will relieve against the payee, and all others who can be affected with notice of fuch objections.

> (1) That all fecurities given for money won or lent at play are void, fee Boyer v. Bampton, 2 Str. 1155. Lowe v. Waller, Doug. 716., and that fo are also securities founded on usurious consideration, see Lowe v. Waller, Doug. 708.

> > chose

chose in action has no remedy at law, or right to sue in his own name, and has only an equitable remedy. And this fails, when the bond or covenant is obtained by fraud (4), or the obligor has a legal discharge, as a release upon payment of the money. So if the bond were assigned for value before payment, there an equitable interest passes, and in such case if the obligor pays the money to the obligee, and cannot plead such payment at law, a court of equity will not interpose to assist him; but if he can, equity will not interpose to affish the assignee (5).

(4) Turton v.
Benfon,
2Vern. 764.
Hill v. Caillovel, 1Vez. 123.
Cator v. Burke,
1 Bro. Ch.
Rep. 434.

(5) Gilb. Lex præ. 290, 291.

SECTION V.

IN the civil law the oath was only to be tendered in civil matters, when the facts and circumstances may render the use of an oath just and decent, and not in criminal matters (1), any more than in the law of *England*. And it is a standing rule in equity, that no one is bound to betray himself

(1) Domat's Civ. Law, B. 3. tit. 6. 13. (2) B. 1. c. 6. § 4.

(3) Mitford's Treatife, 157. 224. (4) Bird v. Hardwicke, 1Vern. 109.

(5) South Sea Company v. Bumpftead, 1 Eq. Ca. Ab. 77, 78.

(6) Gascoigne v. Sidwell, Gilb. Rep. 187.

himself (m). For it is the business of courts of equity to relieve against (2), not to affift forfeitures; and by law no one is bound to discover any matters which tend (n) to subject himself to penalties or forfeitures (3), as a penal clause in an act of parliament (4), or in a deed, though faid it was not a penalty, but part of the contract. But otherwise, if he covenants not to plead or demur to any bill which should be brought against him in equity (5), or the plaintiff waves the penalty (o). And fuch pleas ought to have the greatest strictness and exactness as tend to the support of wrong doing (6). And in some cases, even for a trespass, a bill is proper enough in this court, viz.

- (m) See Grounds and Rudiments of Law and Equity, 225., where this rule is very fully confidered.
- (n) The rule being that "a man shall not be obliged to discover what may subject him to a penalty, and not what must only," per Lord Hardwick, 1 Atk. 539. See also Wallis v. D. of Portland, 3 Vez. 494.
- (a) See Mr. Mitford's Treatife, 157, 158, 224., where the general rules and their exceptions upon this subject are brought together and observed upon with the usual accuracy of that work. See also 8 Vin. Ab. Tit. Discovery.

where

where by the secret contrivance of it, it cannot eafily be proved (7). As if a man in his own ground digs a way under ground to my mineral, and the like. So in case of a bill by the East-India Company for a discovery, and to prevent an interloper's trading to the East-Indies, there is a great difficulty as to the proof, the matter for the greatest part having been transacted in the East-Indies; and therefore the plaintiffs fetting forth, that they were willing to wave the forfeiture, shall have a discovery (8). So where the charge is not by way of trespass, but under colour of title, as that defendant by colour of fequestration by the committee, had feized feveral tithes, &c. due to plaintiff, the plaintiff may pray a discovery of the particulars fo taken, and their value. So where a man by colour of a title enters into an house, &c., and possesses himself of the goods, &c.; for it may be impossible for the plaintiff to discover the particulars without fuch bill. So where a will is proved, and the precedent administration revoked, fuch bill is usually necessary for the discovery of the goods: and yet in strictness of law there was a trespass (9).

(7) East India Company v. Sandys, 1 Vern. Taylor v. Crompton, Bunb. 95. East India Company v. Evans, 1Vern.

(8) Eaft India Company v. Sandys, 1 Verg. 129, 130.

(9) Cage v. Warner, Hard. 182.

SECTION VI.

A ND when this court can determine the matter, it shall not be an handmaid to the other courts (p) nor beget a fuit to be ended elsewhere (1). therefore where a trial at law was preffed for, whether there was a new publication or not; it was faid, the cause must properly end here, and where the court has a

(1) Parker v. Dee, 2 Ch. Ca.

> (p) There are some cases in which, though the plaintiff might be relieved at law, a court of equity having obtained jurisdiction for the purpose of discovery, will entertain the fuit for the purpose of relief. Bishop of Winchester v. Knight, 1 P. Wms. 406. Story v. Ld. Windfor, 2 Atk. 630. Worrall v. Marlar, Exch. July 1786. Lee v. Alston, I Bro. Ch. 194. But there certainly are other cases, when, though the plaintiff be entitled to a discovery, he is not entitled to relief, Jesus College v. Bloom, 3 Atk. 262. Sloane v. Heathfield, Bunb. 18. Piers v. Piers, 1 Vez. 521. Geach v. Barber, 2 Bro. Ch. Rep. 61. To firike out the diftinguishing principle upon which courts of equity in fuch cases have proceeded, would be indeed extremely useful, but after having given confiderable attention to the subject, I find myself incapable of reconciling the various decisions upon it. It is however now fettled, that if the bill feek relief, a general demurrer will hold if the plaintiff be only intitled to difcovery, 2 Bro. 319. 4 Bro. 489.

jurisdiction

jurisdiction as to the end, it must have it likewise as to the means. And if the court is fully satisfied, as to the evidence, they will not send it to a trial at law at all (q).

(q) Quære. Whether this rule applies to the case of wills of real estate obtained by fraud? See Kenrick v. Bransby, 3 Bro. P. C. 358. B. 1. c. 1. s. 2. p. 12. note. See also B. 1. c. 2. s. 2. p. 65. note.

SECTION VII.

FOR an issue at law is a seigned issue in an action upon the case, directed by the chancery for the better information and guiding the conscience of the court (1). And therefore no issue ought to be directed to try a matter sully proved in the cause. So where the proof of deeds is very plain, it would be dangerous to direct an issue to try the reality of them. Neither is it proper to direct an issue, whether there be a trust or not, especially where a trust appears by implication from

(1) Pr.

(2) Balch v. Tucker, 2 Ch. Ca. 40. from the nature of the case. And regularly an issue ought not to be directed to try a title not alledged in the plaintist's bill. Yet if upon the hearing a matter not in issue does appear to the court which goes to the very right, the court will sometimes order an issue at law to try it, and decree thereupon (2). And issues are frequently directed where matters of law are mixed with matters of fact; because the judges can explain to the jury what the law would be, if they should find the fact.

THE END.

R. Noble, Printer, Great Shire Lane.

INDEX

OF

CASES

REFERRED TO.

[The Numerals refer to the Volumes, and the Figures to the Pages.]

A

Abbott v. Massie, ii. 380. 478 Abraham v. Bunn, ii. 459 Abraham v. Cunningham, ii. 379 Abraham v. Twigg, ii. 34 Acherley v. Vernon, i. 446 Ackland v. Ackland, i. 442. ii. 53 Acton v. Pearce, i. 39. 102. 149 Adams v. Adams, ii. 160 Adams v. Buckland, ii. 389 Adams v. Cole, i. 310. 317, 318 Adams v. Gale, ii. 184 Adams & Lambert's Cafe, ii. 215 Adams v. Meyrick, ii. 294. Adams v. Pearce, i. 96 Adams v. Savage, ii. 85. 137 Addison v. Dawson, i. 48. ii. 469 Addison v. Mascall i. 52 Adlington v. Carne, ii. 209 Aggas v. Pickeral, ii. 264 Ayliffe v. Murray, ii. 175 Aynsley v. Rutter, i. 372 Akeroid v. Smithson, i. 422. ii. 118 St. Alban's (Duke of) v. Shore, i. St. Alban's (Sir John) Cafe, i. 87 Albermarle (Duchess of) v. Bath, ii. Alderson v. Temple, i. 205 Alexander v. Alexander, i. 326. ii. 198 Alford v. Alford, i. 322 All Soul's Coll. v. Codrington, ii. Allanson v. Clitherow, ii. 59 Vol. II.

Allen v. Allen, i. 218 Allen v. Bahington, i. 390 Allen v. Callow, ii. 350 Allen v. Dundas, ii. 377 Allen v. Harding, i. 172 Allen v. Hilton, i. 432 Allen v. Sayer, ii. 469 Altham v. E. of Anglesea, ii. 14. 43 Altham's Case, i. 453 Alves v. Hodgson, ii. 439 Amand v. Bradburne, ii. 176 Ambrose v. Hodgson, i. 174. 407. 412. ii. 59. 71 Amhurst v. Dawling, ii. 257 Amos v. Horner, i. 260 Ancaster (D. of) v. Mayor, ii. 286, 287 Anderson v. Maltby, i. 274 Andrew v. Clarke, ii. 129 Andrews v. Partington, ii. 170. 346 Andrews v. Powis, ii. 486 Andrews v. Wrigley, ii. 450 Angell v. Draper, ii. 481 Angier v. Angier, i. 94. 98. 105. Annand v. Honeywood, i. 287 Annandale (Marchis. of) ex parte, i. 59. 61 Annadale v. Harris, i. 228 Anftey v. Chapman, i. 443. ii. 54 Anstey v. Dowfing, i. 197 Anstey v. Reynolds, i. 229 Applyn v. Brewer, ii. 181 Archer's Cafe, ii. 78.90. 146 Archer v. Moss, i. 69 Kk Archer

INDEX OF CASES.

| Archer v. Pope, i. 100 | Attorney-Gen. v. Bp. of Oxford, ii. |
|--|--|
| Ardglass v. Marckamp, i. 141 | |
| Arlington v. Meyrick, i. 441 | - v. Bowles, ii. 214 |
| Armiger v. Clark, i. 433 | w. Brewer's Comp. |
| Armitage v. Mercalfe, ii. 285 | ii. 435 |
| Armstrong, ex parte, i. 56 | v. Burdett, i. 37. ii. |
| Armstrong v. Elveridge, ii. 96 | 214 |
| | |
| Arnold v. Attorney General, ii. 220 | v. Caldwell, ii. 213, |
| Arnold . Chapman, ii. 212. 214 | 214 |
| Arnott v. Bigle, i. 161 | v. City of London, |
| Arthington v. Coverley, i. 84. ii. 250 | ii. 216 |
| Arthington v. Fawkes, i. 293 | |
| Annual Dillock | v. Christie, i. 227 |
| Arundel v. Philpot, i. 322 | |
| Arundel v. Trevillion, i. 264 | 11. 217 |
| Ash v. Galan, ii. 16 | v. Clarke, ii. 216 |
| Ashburner v. Macguire, ii. 362. 370 | v. Crispin, ii. 351 |
| Ashburnham v. Bradshaw, ii. 212 | Crofts ii. 268 |
| | v. Day, i. 179 |
| Ashenhurst v. James, ii. 435 | v. Day, 1. 179 |
| Asherton v. Rooke, i. 204 | v. Downing, ii. 212 |
| Ashton v. Ashton, i. 164. 446. ii. | v. Doughty, i. 32 |
| 362. 370 | - v. Foundling Hof- |
| | |
| Afhton v. Smith, ii. 435 | pital, ii. 206 |
| Aspinall v. Aspinall, ii. 173 | v. Goulding, ii. 216 |
| Aftley v. Powis, ii. 402. 435. 438 | v. Graves, ii. 212 |
| Aftley v. Reynolds, i. 245. | v. Griffith, ii. 454 |
| Aftley v. E. of Tankerville, i. 102 | - Guife ii. 216 |
| Afton v. Smallman, ii. 102 | v. Guise, ii. 216 |
| All Cal Banks | |
| Atherford v. Beard, i. 236 | Company, ii. 221 |
| Atkin v. Berwick, i. 206 | v. Hart, ii. 217 |
| Atkins v. Atkins, i. 436 | v. Hawes, ii. 212 |
| Atkins v. Dawbury, ii. 430 | g, Heartwell, 11, 212 |
| Atkins v. Hill, ii. 405 | v. Herrick, ii. 215 |
| Atkins v. IIII, II. 405 | v. Herrick, II. 21) |
| Atkins v. Hord, ii. 80 | v. Hewer, ii. 208 |
| Atkins v. Hatton, ii. 466 | v. Hickman, ii. 216 |
| Atkins v. Waterson, ii. 81 | w. Johnson, ii. 220 |
| Atkinfon v. Baker, ii. 396 | v. Johnson, ii. 220 v. Lloyd, ii. 212 |
| Achinfon - Husekinfon ii eee | Manager Covers |
| Atkinson v. Hutchinson, ii. 320 | v. Mayor of Coven- |
| Atkinfon v. Lennard, i. 17 | try, 11. 222 |
| Atkinion v. Morris, i. 300 | v. Mevrick, ii. 213 |
| Atkinfon v. Webb, ii. 327 | v. Middleton, ii. 206 |
| Attorney Cen - Andrews : 40 | Miles ii aas |
| Attorney-Gen. v. Andrews, i. 40. | v. Milner, ii. 202 |
| 11. 210 | v. Minshull, ii. 221 |
| v. Baxter, ii. 216 | v. Nash, ii. 214 |
| v. Baynes, ii. 210 | v. Oglander, ii. 216 |
| v. Bury, ii. 342 | |
| | v. Palmer, ii. 207 |
| v. Bp. of Chester, | v. Parnther, i. 67.72 |
| ii. 214 | v. Parkyn, ii. 362 |
| | Attorney- |
| | A STATE OF THE STA |

HHHHH

INDEX OF CASES.

i.

i.

3, n,

1,

2

ſ-

6

5

16

n-

306

I

16

72 y-

| Attorney-Gen. v. Peter House, ii. | Baden v. E. of Pembroke, i. 435. |
|---|--------------------------------------|
| 217 | 440. ii. 114 |
| v. Platt, ii. 217 | Badrick v. Stephens, ii. 362 |
| v. Randall, ii. 181 | Bagg v. Foster, i. 167 |
| v. Rye, ii. 210 | Bagot v. Oughton, ii. 293 |
| v. Sandys, ii. 114 | Bagshaw v. Spencer, i. 410 |
| v. Scott, ii. 100 | Bailey v. Corporation of Leominster, |
| v. Siderfin, ii. 215 | i. 433 |
| 7. Sparkes, ii. 220 | Bailey v. Powell, ii. 129 |
| v. Sparkes, ii. 220 v. Spillett, ii. 209 | Bailey v. Robinson, ii. 273 |
| v. Tindall, ii. 214 | Bainbridge v. Pickering, i. 73 |
| | Baker v. Bailey, i. 299. 303 |
| v. Thompson, ii. 431 | Baker v. Hall, i. 428 |
| v. Tomkins, ii. 213 | |
| v. Tonner, ii. 220 | Baker v. Jennings, i. 351 |
| v. Twilden, 11. 36 | Baker v. Lade, i. 32 |
| w. Weymouth, ii. 212 | Baker v. Payne, i. 122. 200 |
| Whorewood, i. 96. | Baker v. Rogers, i. 232 |
| 99 Winshalfes :: | Baker v. Shelbury, i. 41. 43 |
| w. Winchelsea, ii. | Baker v. White, i. 262. 264 |
| 214. 221 | Balch v. Hyam, ii. 278 |
| Atwater v. Birt, ii. 49 | Balch v. Tucker, ii. 496 |
| | Baldwin v. Boulter, i. 132 |
| Attwood v. Lamprey, 11. 5. | Baldwin v. Johnson, ii. 102 |
| Avelyn v. Ward, ii. 370 | Baldwin v. Rochford, i. 135 |
| Awdley v. Awdley, ii. 284 | |
| Aylett v. Dodd, ii. 216 | Bale v. Coleman, i. 403. 406. 418 |
| Ayliffe v. Archdale, i. 78 | Bale v. Newton, i. 274. 321 |
| Ayliffe v. Tracey, i. 191 | Balguy v. Hamilton, ii. 119 |
| Ayliffe v. Fanshaw, i. 42 | Ball v. Montgomery, i. 95. 106 |
| Ayliffe v. Murray, ii. 175 | Ball v. Smith, i. 99. ii. 126 |
| Aylesford's Cafe, i. 180. 184 | Ballett v. Spranger, i. 386 |
| Ayray's Cafe, i. 428 | Bamfield v. Popham, ii. 55. 58, 59 |
| Ayton v. Ayton, ii. 346 | Bamfield v. Wyndham, ii. 285, 286 |
| 11/1011 01 11/1011/ 11 31 | Banks v. Sutton, ii. 98. 103 |
| | Barclay v. Wainwright, ii. 350 |
| В | Burjeau v. Walmsley, i. 235 |
| | Barker v. Boucher, ii. 398 |
| Babb v. Dewdney, i. 20 | Barker v. Giles, ii. 68. 102 |
| | Barker v. Hill, i. 40. 349 |
| Babington v. Wood, i. 232 | Barker - Vesta ii ta aa |
| Babington v. Greenwood, i. 287. | Barker v. Keate, il. 12. 30 |
| 421 | Barker v. Reading, i. 435 |
| Bachelor v. Gage, i. 353. 362 | Barker v. Vansommer, i. 135. 140 |
| Bachelor v. Serle, ii. 127. 475 | Barlow v. Grant, i. 73. ii. 235. 364 |
| Back v. Andrews, ii. 121, 122. 125 | Barnard v. Godschall, i. 362 |
| Backhouse v. Middleton, ii. 462 | Barnard v. Large, ii. 174 |
| Backhouse v. Walls, ii. 60, 61. 75 | Barnardiston v. Fane, i. 396 |
| Bacon v. Clarke, ii. 435 | Barnardiston v. Lingwood, i. 131. |
| Bacon v. Hale, ii. 54 | 135.327 |
| Kk 2 | Barnes |
| n | Dattics |

INDEX OF CASES.

Barnes v. Allen, i. 214. ii. 367 Barnes v. Crow, i. 218 Barnesly, ex parte, i. 63 Barnfly v. Powell, i. 69. ii. 316. Barrell v. Sabine, ii. 262 Barrett v. Beckford, ii. 327 Barrett v. Gore, ii. 461 Barrett v. Glabb, i. 232 Barrington v. Horne, i. 293 Barrington v. Searle, i. 333 Bartlett v. Emery, i. 79 Bartlett v. Hollister, ii. 346 Bartholemew v. May, ii. 200 Barton v. Sadock, ii. 184 Barwell v. Brooks, i. 109 Barwell v. Parker, i. 424. 435 Baskerville v. Baskerville, i. 394. 407.411 Baffe v. Gray, i. 402 Baffett v. Clapham, ii. 173 Baffett v. Naswortny, ii. 30 Bachelor v. Searle, i. 202. ii. 132. 476 Bate's Cafe, i. 170 Bates v. Danby, i. 107. 313. 318 Bateman v. Bateman, i. 283, 284. ii. 12I Bateman v. Johnson, i. 33 Bath (Bp. of) v. Hippefley, i. 78 Bath (E. of) v. Batterfea, ii. 462 Bath (E. of) v. Bradford, ii. 424 Bath's (E. of) Cafe, i. 445 Bath and Montague's Cafe, i. 67. 322. 124. 323. 349. ii. 160. 166 Bathurst v. Burden, i. 32 Batfon v. Lindegreen, i. 284. ii. 397 Batten v. Earnley, i. 159. ii. 425 Batty v. Lloyd, i. 132 Baugh v. Price, i. 136 Baugh v. Reed, i. 428. ii. 342 Bawder v, Amherst, i. 170. 177 Baxter v. Manning, ii. 273 Baycott v. Cotton, ii. 202 Bayley v. Robson, ii. 272 Baylis v. Attorney-General, ii. 478

Baylis v. Newton, ii. 122 Baynham v. Guy's Hospital, i. 433. Baynton v. Bobbelt, i. 383 Beachcroft v. Beachcroft, ii. 400 Beale v. Beale, ii. 426 Beard v. Beard, i. 103 Beard v. Nuthall, i. 348 Beauclerk v. Dormer, 80. 319 Beaufort v. Bertie, ii. 230. 247 Beaumont v. Fell, ii. 40 Beaumont v. ---, i. 439 Becher, exparte, ii. 248 Beckett v. Cordley, i. 76. 161. 163 Beckford v. Tobin, ii. 429. 431. Beckley v. Newland, i. 215 Beckwith's Cafe, ii. 98 Bedell's Cafe, ii. 26. 29. 32 Bedell v. Constable, ii. 245. 246 Bedford (E. of) v. Russell, ii. 163 Belch v. Harvey, ii. 264 Belch v. Westall, ii. 481 Belchier, ex parte, ii. 181 Belchier v. Renforth, i. 320 Belfour v. Weston, i. 375 Bell v. Hyde, i. 103. 108 Bellamy v. Alden, ii. 414 Bellamy v. Burrow, i. 226 Bellasis v. Burbrick, i. 357. 363 Bellasis v. Compton, ii. 137 Bellasis v. Cramen, i. 260 Bellafis v. Uthwaite, ii. 324. 327 Belvidere v. E. of Rochford, ii. 287 Bennett v. Bachelor, ii. 127. 128 Bennett v. Davis, i. 105 Bennett v. Edwards, ii. 269. 435 Bennett v. Honeywood, ii. 91 Bennett v. Lee, i. 75 Bennett v. Wade, i. 63. 66. 69. ii. 316 Bennett v. Whitehead, i. 158 Benfon v. Baldwin, i. 155 Benfon v. Bellafis, i. 205 Benson v. Gibson, i. 152 Benfon v. Baldwin, i. 155 Benfon v. Benfon, i. 425 Bentham

1

I

I

I

I

H

I

I

F

I

F

H

E

E

E

E

B

E

E

B

B

B

B

Bentham w. Haincomb, ii. 178 Beresford's Cafe, i. 434. ii. 68 Beringer v. Beringer, i. 69 Berney v. Pitt, i. 135. 141 Berkly v. E. of Salisbury, i. 155 Berrisford v. Milward, i. 161 Berry v. Askham, i. 447 Bertie v. Ld. Dormer, i. 430 Bertie v. Ld. Falkland, i. 211. 259. 396. 400. ii. 235 Best v. Stamford, i. 440. ii. 107.112. Bettefworth v. Dean and Chapter of St. Paul's, i. 31. 149 Beverley's Cafe, i. 46. 52. 54. ii. Beversham's (Sir Wm.) Case, ii. 471 Bexwell v. Chriftie, i. 227 Beynon v. Collins, i. 92 Bigge v. Benfley, ii. 319 Biddle v. Biddle, i. 290 Birkham v. Crofs, ii. 435 Birkham v. Freeman, ii. 397 Bill v. Price, i. 135. 140 Billinghurst v. Walker, ii. 287 Bilfen v. Saunders, ii. 429 Bingham v. Bingham, i. 116, 117 Binstead v. Coleman, i. 180. 200 Birchell, ex parte, ii. 248 Bird v. Blois, i. 190 Biod v. Lockey, ii. 185 Biscoe v. E. of Banbury, ii. 151. Bishop of Cloyne v. Young, ii. 128 Bishop v. Godfrey, ii. 402 Bishop of Oxford v. Layton, ii. 156 Bishop v. Sharp, i. 83. ii. 164 Bize v. Dickers, ii. 5 Bixby v. Ely, i. 38 Blackborough v. Davis, ii. 388, 389 Blackbale v. Combs, i. 155 Blackburn v. Gregfon, i. 153. 301 Blackwell v. Nash, i. 391 Blackwell v. Redman, i. 234 Blackwood v. Morris, i. 96 Blades v. Blades, i. 25 Blagrave v. Blagrave, i. 104

Blagrave v. Clunn, ii. 436 Blake v. Hungerford, i. 320 Blamford v. Blamford, i. 449. ii. 68. 356 Blanchard v. Hill, i. 33 Blanchett v. Foster, 1. 269 Bland v. Bland, ii. 37 Bland v. Middleton, i. 399 Blandy v. Widmore, ii. 324 Blanford v. Fackeral, ii. 214 Blany v. Henerick, ii. 435 Blatch v. Wilder, ii. 397 Bletfow v. Sawyer, i. 95. 103 Blewett v. Thomas, i. 333 Bligh v. E. of Danby, ii. 402 Blinkhorn v. Feaft, ii. 130, 131 Blois v. Blois, ii. 349 Blois v. Lady Hereford, i. 319 Blount v. Burrow, i. 289 Blount v. Winter, i. 101 Blunt's Cafe, i. 87. 95 Blytheman v. Blytheman, ii. 39, 40 Boardman v. Mosman, ii. 181 Boddam v. Riley, ii. 435. 442 Boden v. Watson, ii. 58. 66 Bodily v. Bellamy, ii. 441 Bokenham v. Bokenham, i. 37. 349 Bolton v. Bull, i. 33 Bolton (D. of) v. Williams, i. 119 Bolton (D. of) v. Deane, i. 15. 157 Boll v. Sir H. Winton, ii. 28. 144 Bond v. Sewell, i. 195 Bond v. Symonds, i. 88. 96 Bond v. Kent, i. 153 Bonham v. Newcombe, i. 41. 349. 11. 261 Bonner v. Thwaites, i. 48 Bonnington v. Walthall, i. 329 Bonnithorne v. Hockmore, ii. 176 Boon v. Cornforth, ii. 332 Boone v. Eyre, i. 390 Booth v. Booth, ii. 268 Booth v. Rich, i. 61. ii. 269 Borr v. Vandal, ii. 186 Borrelt v. Gomesara, i. 180 Bosanquet v. Dashwood, i. 24. 140. 246. ii. 6 Bofden

Bosden v. Thynn, i. 345. Bosville v. Brander, i. 154. 317. Boteler v. Allington, i. 148. Bovey's Cafe, i. 278. Bovey v. Smith, ii. 83. 151, 152. 155. 301. Boulton v. Canon, i. 355. 359. 362. Bourdillon v. Adair, i.95. Bowater v. Elly, i. 303. ii. 172. Bouverie v. Prentice, i. 155. Bowers v. Littlewood, 11. 395. Bowes v. Blackall, ii. 53. 57. 98. Bowker v. Hunter, ii. 120. Bowyer v. Bampton, i. 235. ii. 490. Boyce v. Peterborough, ii. 198. Brace v. Duchess of Marlborough, i. 320. ii. 300. 303. Bradford v. Foley, ii. 298. Bradley v. Bradley, i. 37. 349. Bradly v. Powell, ii. 202. Bradwin v. Harper, i. 118. Brady v. Cubitt, ii. 65. 351. Braithwaite v. Braithwaite, ii. 187. Brand v. Cumming, i. 246. Brandlyn v. Ord, i. 42. ii. 147. Brandon v. Bowles, i. 186. Branfdon v. Winter, ii. 362. Brasbridge v. Woodroffe, ii. 130. Bravel v. Pocock, i. 289. Bree v. Holbech, i. 363. Brend v. Brend, ii. 289. Brent's Cafe, ii. 8. Brereton v. Cowper, i. 122. Brereton v. Jones, ii. 276. 300. Brett v. Cumberland, i. 362. Brett v. Rigden, i. 174. 218. Brewin v. Brewin, ii. 203. Brewster v. Kitchell, i. 222. Brian v. Acton, i. 225. 292. Brice v. Carr, i. 144. 205. Brice v. Smith, ii. 64. Bridge v. Abbott, ii. 363. Bridges, Lady Ann, ex parte, ii. 103. 248. Bridges v. Duke of Chandos, i. 200. Bridgeman v. Dove, ii. 286.339. Bridges v. Michell, i. 329.

Bridgeman v. Green, i. 69. ii. 460. Bridgewater, Duke of, v. Edwards, Briers v. Goddard, ii. 382. 409. Bright v. Eynon, i. 66. Bright v. Woodward, ii. 407. Briftol, Earl of, v. Hungerford, i. 320. ii. 304. Bristow v. Ward, ii. 198. Britton v. Bathurft, ii. 403. Broderick v. Broderick, i. 121. 123. 195. Brodie v. S. Paul, i. 191. Brodie v. Duke of Chandos, ii. 213. Brograve v. Winder, i. 19. Broker v. Charter, ii. 377. 389. Brome v. Berkley, ii. 200. Bromage v. Jenning, i. 30. 36. Bromfield ex parte, i. 421. Bromley v. Hammond, ii. 276. Bromley v. Jefferies, i. 30. 172. Brook, ex parte, i. 83. Brook v. King, i. 230. Brooke, Ld. v. Ld. and Lady Hereford, i. 19. 81. Brookbank v. Brookbank, i. 274. Brooks v. Brooks, i. 94. Brooks v. Gally, i. 134. 141. Brooks v. Reynolds, ii. 407. Brooks v. Taylor, ii. 108. Broomfield v. Witherby, ii. 186. Brotherow v. Hood, i. 314. Brotherton v. Hutt, ii. 153. Broughton v. Conway, i. 311. Broughton v. Langley, i. 407. ii. 26. Broughton v. Allen, ii. 373. Brown v. Barkham, i. 398. ii. 433. 435. Brown v. Davis, ii. 489. Brown v. Elton, i. 96. Brown v. Gibbs, ii. 112. 164. Brown v. Litton, ii. 185. Brown v. Marsh, i. 346. Brown v. Raindle, i. 371. Brown v. Vandel, ii. 186. Brown v. Quilton, i. 376. Brown

H

E

B

B

B

B

B

B

B

Brown v. Selwyn, i. 202. ii. 127. Browning v. Morris, i. 245. ii. 6. Brownfword v. Edwards, i. 449. ii.

Bruges v. Curwen, i. 292.
Brudenell v. Brudenell, i. 198.
Brummell v. Prothero, ii. 286.
Bryan v. Wolley, i. 311.
Buckingham, Earl of, v. Drury, i.

Buckingham, Earl of, v. Sir Robert Gayer, ii. 178. Buckland v. Barton, i. 326. Buckle v. Atleo, ii. 408. Buckley v. Symonds, ii. 39, 40.

Buckeridge v. Ingram, i. 386. Buffer v. Bradford, ii. 130. Buggin v. Yates, ii. 37.

Buller v. Waterhouse, ii. 156. Bullock v. Dormer, i. 375. Bulling v. Frost, i. 233.

Bunce v. Phillips, i. 302. ii. 489. Bunter v. Cook, i. 218, 219. Burnaby v. Griffith, i. 149.

Burford v. Lee, ii. 79.
Burrell's Case, i. 281.

Burchit v. Durdant, i. 407. 428. ii. 26. 73.

26. 73. Burgess v. Wheate, i. 24. 420. ii. 10. 169.

Burgh v. Burgh, i. 37. 352. ii. 147. Burgh v. Francis, ii. 306. Burley's Case, ii. 69. Burlton v. Humphreys, i. 262.

Burnett v. Holgrave, ii. 364. Burton v. Knowlton, ii. 286. Burt v. Barlow, i. 117.

Butcher v. Staples, i. 180.
Burton v. Haftings, i. 203.
Burton v. Pierpoint, i. 105.
Burtonshaw v. Gilbert, i. 430. ii.

361.
Burwell v. Corrant, ii. 397.
Bufh v. Buckingham, i. 122.
Bufhell v. Lechmere, i. 383.
Butcher v. Hinton, i. 301.

Butcher v. Hinton, i. 391. Butler v. Baker, i. 205. Butler v. Duncombe, i. 96. 434. ii. 200, 201. 435.
Buller v. Freeman, ii. 230. 431.
Butler v. Sir H. Cheney, i. 267.
Butler v. Stratton, ii. 345.
Butterfield v. Butterfield, ii. 79.
Buxton v. Lifter, i. 122. 131. 172.

Byas v. Byas, i. 350. Byfield's Cafe, ii. 68.

C

Cadogan v. Kennett, i. 270.
Cæfer and Lake's Cafe, i. 171.
Cage v. Acton, i. 101. 149. ii. 163.
Cage v. Warner, ii. 493.
Calcraft v. Roebuck, i. 393.
Calcraft v. Hill, ii. 471.
Calland v. Troward, i. 372. 397.
Callow v. Mince, ii. 460.
Calmady v. Calmady, i. 21. 103.
Calonal v. Briggs, i. 390. 392.
Calthorp's Cafe, ii. 26.
Calverly v. Williams, i. 393.
Calye's Cafe, ii. 331.
Campbell v. Earl of Radnor, ii. 214.
Campbell v. Campbell, ii. 102.
Campbell v. Leach, i. 223.

Campbell v. Campbell, ii. 102.
Campbell v. Leach, i. 223.
Campbell v. French, i. 118. ii. 439.
Cann v. Cann, i. 122.
Cannell v. Buckle, i. 31. 39. 74.
102. 149.

Cannon's Cafe, ii. 64. Canterbury, Archbishop of, v. Wills, ii. 414, 415. Capper v. Harris, i. 31. 130. 141. Cappodoce v. Peckham, i. 274. Carlton v. Earl of Dorset, i. 189.

269. Carr v. Bedford, ii. 345. Carr v. Countes of Burlington, ii.

Carr v. Eastbrooke, i. 103. ii. 327. Carr v. Ellison, i. 425. ii. 192. Carey v. Gooding, ii. 130,

Carnell v. Sykes, ii. 265. Carpenter v. Carpenter, i. 303. Carpenter v. Tucker, i. 332. Carpenter v. Smith, ii. 45. 49. Carruthers v. Carruthers, i. 76. Carter v. Carter, i. 133. 363. 425. Carter v. Crawley, ii. 392. 395. Carter v. Cummins, 1. 376. Carter, ex parte, ii. 272. Carter v. Kinftead, i. 451. Carteret v. Paschal, i. 316. Cartwright's Cafe, ii. 184. Cartwright v. Pulteney, i. 21. Cary v. Atkins, i. 170. Casbomo v. Scarfe, ii. 99. 258. Cafs v. Rudell, i. 132. 294. 370. Caffon v. Dade, i. 195. Castle v. Dodd, ii. 11. 23. Catchfide v. Ovington, ii. 414. Cator v. Burke, i. 269. 11. 491. Cator v. Price, i. 192. Cavan, Lady, v. Pulteney, ii. 326. Cave v. Cave, ii. 202. 366. Cavendish v. Cavendish, ii. 332. Cavendish v. Worsley, i. 301. Cecilv. Earl of Salisbury, i. 79. 143. 11. 270. Cecil v. Juxon, i. 103. Cecil v. Plaistow, 1. 267. Chaddock v. Cowley, ii. 64. Challis v. Casborne, ii . 273. 397. Chamberlain v. Chamberlain, i. 69. 83. 11. 177. 434. Chamberlaine v. Ewer, ii. 163. Chamberlain v. Hewitstone, i. 94. Chambers v. Chambers, i. 405. Chambers v. Harvest, ii. 397. Champion, ex parte, 11. 185. Champernon v. Gibbs, i. 154. Chancellor of Oxford's Cafe, i. 428. Chancey v. Fenhoulet, i. 260. Chandler v. Lopez, i. 120. Chandos, Duke of, v. Talbot, i. 214. ii. 163, 164. 203, 204. Chaplin v. Chaplin, ii. 100. 324. Chaplin v. Horner, i. 421. ii. 193.

Chapman v. Bliffet, ii. 91. Chapman v. Bond, ii. 114. Chapman v. Brown, ii. 83. Chapman v. Gibson, i. 39. 351. Chapman v. Hart, ii. 329. 332. Chapman v. Tanner, i. 153. 381. ii. 178. Charterfield v. Bolton, i. 375. Charlton v. Lowe, ii. 105. Chatham, Earl of, v. Tothill, ii. 79. Chauncey's Cafe, ii. 323. Chauncey v. Graydon, i. 214. 259. Chauncey v. Fenhoullet, i. 260. Chauncey v. Tahourden, i. 246. 260. Cheddington's Cafe, i. 173. 213. ii. Cheek v. Lisle, i. 446. ii. 75. Cheney's (Lord) Case, i. 200. 427. 11. 40. 476. Cheatham v. Lord Audley, ii. 175. Chester (Lady's) Case, ii. 240. 376. Chester v. Willis, ii. 163, 164. Chesterfield v. Janssen, i. 81. 124. 143. 248. 253. Chesterfield v. Lady Cromwell, ii. 170. Chichester v. Bickerstaff, i. 424. Chichester v. Phillips, ii. 312, 464. Child v. Danbridge, i. 267. Child v. Godolphin, i, 180. Child v. Hardyman, i. 100. Child v. Stephens, 1. 283. Chilliner v. Chilliner, i. 152. Chitty v. Parker, i. 348. 353. 421. 11. 192. Cholmley's Cafe, i. 211. Christ's Col. Case of, Cambridge, 11. 210. Christ's Hospital v. Budgen, ii. 125. Christian v. Wren, ii. 462. Christmas v. Christmas, i. 200. Christopher v. Christopher, ii. 65. Chudleigh's Cafe, i. 363. ii. 8. 16. 18. 22. 29, 30. 45. 81. 90. 138. 144. Chumley's

Church v. Church, i. 345 Churchill v. Groves, ii. 302 Churchill v. Lady Hobson, ii. 181 Churchman v. Harvey, ii. 200 Chute v. ---, ii. 29 City v. City, i. 289 City of London v. Garway, ii. 56 City of London v. Nash, i. 355 City of London v. Richmond, i. 127. 131. 296. 351 Civil v. Rich, ii. 37, 198 Clare v. Earl of Bedford, i. 161 Clare v. Clare, ii. 79. 108 Clannell v. Lewthwaite, ii. 132 Clanrickard's Cafe, i. 434 Clark v. Smith, ii. 93 Clapham v. Boyer, ii. 264 Clarges v. Albermarle, ii. 319 Clark v. Clark, i. 48 Clarke v. Blake, ii. 346, 347 Clark v. Abbot, i. 319 Clark v. Gurnell, i. 388. 390 Clark v. Martin, i. 346 Clark v. Rofs, ii. 203. 367 Clark v. Thompson, i. 102 Clarke v. Ward, ii. 470 Clark v. Day, ii. 69. 75 Clark v. Sewell, ii. 327 Clarke v. Turner, ii. 198 Clarke v. Thompson, i. 102 Clarke v. Ward, i. 53 Clarkson v. Boyer, ii. 284 Clarkson v. Hanway, i. 65. 69. 120. Clatche's Cafe, ii. 66 Clavering v. Clavering, i. 274 Claydon v. Spencer, ii. 409 Clayton v. Ashdown, i. 80 Clayton's Case, i. 242 Cleland v. Cleland, i. 100. 319 Clench v. Cudmore, ii. 245 Clench v. Witherby, ii. 262 Clare's Cafe, i. 326 Clerk v. Berkley, i. 262 Clerk v. Day, ii. 77 Clerk v. Letherland, i. 289 Vol. II.

Chumley's Cafe, i. 58

Clerk v. Wright, i. 186. 190 Clifford v. Burlington, i. 322. 359 Clifton v. Birt, ii. 298 Clifton v. Jackson, ii. 76 Clinton v. Hooper, i. 102. ii. 289 Cloberry's Cafe, ii. 366 Cloberry v. Symonds, ii. 264 Clowdsley v. Pelham, ii. 36 Cloyne v. Young, ii. 128 Clun's Cafe, i. 383 Clutterbuck v. Smith, ii. 397 Cob v. Batterson, ii. 39 Cock v. Goodfellow, ii. 409 Cockshott v. Bennett, i. 258, 267. Cocking v. Pratt, i. 116. 134 Coggs v. Bernard, ii. 179 Coke v. Bullock, ii. 64 Coke v. Fountain, ii. 462 Cokes v. Mascal, i. 191 Cole v. Gibbon, i. 135. 139 Cole v. Gibson, i. 134. 141. 262. 264 Cole v. Gray, ii. 457 Cole v. Livingstone, ii. 56 Cole v. Rawlinfon, ii. 55 Cole v. Robins, i. 67 Cole v. Shallett, i. 390 Colecot, Dr. v. Hill, ii. 470 Coleman v. D. of St. Alban's, ii. 279 Coleman v. Coleman, ii. 362 Coleman v. Sorrell, i. 348 Coleman v. Wynch, ii. 272 Coles v. Emerson, i. 332 Coles v. Jones, i. 269 Colesworth v. Brangwin, ii. 130 Colfield v. Wilfon, ii. 460 Collard v. Collard, ii. 21. 33. 39. Collett v. De Gols and Ward, ii. 147 Collett v. Collett, i. 425 Collett v. Jaques, i. 155 Collier's Case, i. 142. ii. 53, 54. 436 Collins v. Blantern, i. 122. 230 Collins v. Metcalfe, ii. 366 Collins v. Plumer, i. 167. ii. 82 Collins v. Wills, i. 267 Collingwood v. Wallis, ii. 193 Collifon's

Collison's Case, ii. 209 Colman v. Sarrell, i. 41. 406 Colfon v. Colfon, i. 407. ii. 79 Colfton v. Gardner, i. 276. ii. 159 Colt v. Colt, ii. 98 Coltman v. Senhouse, i. 147. ii. 31. Colville v. Parker, i. 274. 279 Colwall v. Shadwell, i. 425 Combe v. Spencer, ii. 466 Comber's Cafe, i. 329 Compton v. Collison, i. 113. 310 Compton v. Oxenden, i. 351. ii. 164 Congreve v. Congreve, ii. 346 Conolly v. Parfons, i. 393 Conway v. Conway, ii. 199 Conway v. Shrimpton, ii. 170, 171. 266 Conyers v. Hammond, i. 375, 381 Conyton v. Helvin, i. 449 Cook v. Arnham, i. 39 Cook v. Bamfield, i. 18 Cook v. Goodfellow, ii. 414 Cook v. Oakley, ii. 332 Cook v. Parfons, i. 81. ii. 270 Cooke v. Baker, i. 190 Cooke v. Walker, ii. 129 Cookes v. Mascall, i. 170 Cooke v. Parsons, i. 195. 11, 275 Cooper v. Andrews, i. 112 Cooper v. Cooper, i. 352 Cooper v. Denn, i. 191 Cooper v. Forbes, ii. 91 Cooper v. Thornton, i. 74 Coote v. Mammon, ii. 153 Cope v. Cope, ii. 287. 292 Cope's (Lady Mary) Cafe, i. 57 Copeman v. Gallant, i. 435 Coppin v. Coppin, ii. 83. 441 Copping v. Cooke, ii. 178 Copplestone v. Boxall, ii. 262 Corbett's Cafe, i. 424. ii. 34. 49. 82

Corbett v. Maydwell, ii. 199

Cordwell v. Mackrill, i. 204

Corbett v. Poelnitz, i. 110

Cordell v. Noden, ii. 128

Corbett v. Sykes, ii. 265

Cory v. Cory, i. 67 Cother v. Meyrick, i. 452 Cotten v. Layer, i. 112. 323 Cottington v. Fletcher, i. 180. ii.36. 116 Cotton v. Cotton, i. 102 Cottrell v. Hampson, ii. 148 Cottrell v. Purchase, i. 160. 330. 437 ii. 262 Coventry (Countess of) v. Earl of Coventry, 1. 301. 322. 367. ii. 287 Coventry v. Hall. i. 14 Coulson v. Coulson, i. 407. ii. 77 Coulfon v. White, i. 31, 32 Counden v. Clerke, i. 428 Cowper v. Cowper, i. 23. 403. ii. Cowper v. Douglas, ii. 185 Cowper v. Scott, ii. 203 Cox (Sir Ch.) Cafe, ii. 398 Cox's (Lady) Cafe, i. 229. 346 Cox v. Foley, i. 55 Cox v. Highford, i. 396 Cozen's Cafe, ii. 68 Craddock v. Cowley, ii. 64 Crane v. Drake, ii. 150 Cranmer's Cafe, ii. 78. 327 Craven v. Tickell, ii. 424 Cressett v. Mytton, i. 11 Cray v. Rooke, i. 228. 290 Cray v. Willis, ii. 102. 318 Creyston v. Bayne, i. 179 Crickett v. Dolby, ii. 366. 431 Crockett v. Crockett, ii. 362 Croft v. Pawlett, i. 195 Crommer v. Champney, i. 234 Croke v. Watts, ii. 389. 395 Crowder v. Clowes, ii. 328 Crompton v. Sale, ii. 327 Cromwell's (Ld.) Cafe, i. 309. 436 Crooke v. Brooking, ii. 36 Crop v. Fustenditch, ii. 29 Crosby v. Middleton, i. 40 Crofs v. Addenbroke, i. 421. ii. 192 Cross v. Wadhold, ii. 60. 62 Crosse v. Gardner, i. 120 Croffing

I

I

Croffing v. Scudamore, i. 147. ii. 48 Crossley v. Clare, ii. 345 Crowe v. Ballard, i. 141. ii. 189 Crull v. Dodfon, i. 121 Cruse v. Barley, i. 422. ii. 118. 192 Cruse v. Orby Hunter, ii. 230 Cruse v. Lowther, ii. 426 Cudd v. Rutter, i. 31. 130. 149. 11. 433 Cull v. Showell, ii. 326 Cullen v. Duke of Queensberry, i: 296 Culpepper v. Afton, ii. 148, 298. Cunliffe v. Cunliffe, ii. 37 Cunningham v. Moody, i. 425 Curling v. May, i. 421. ii. 191 Curtis and Cottel's Cafe, i. 205 Curtis v. Curtis, i. 14. 23. 156. ii. 482 Curwyn v. Milner, i. 134, 135. 141 Cufack v. Cufack, i. 404 Cuthbert v. Peacock, ii. 324. 475 Cuthell v. Smith, i. 42 Cutler v. Coxeter, ii. 293

D

Dacosta v. Jones, i. 236 Dacres (Lady) v. Shute, ii. 436 Dafforn v. Goodman, ii. 79. 443 Daintry v. Daintry, ii. 93 Daley v. Clanrickarde, i. 262 Daley v. Desbouverie, i. 261 Dalton v. James, ii. 212 Dandy v. Turner, i. 254 Daniel v. Skipwith, ii. 268 Daniel v. Ubley, i.92 Darbison, on demise of Long, v. Beaumont, i. 428. 430 Darby v. Boucher, i. 73 Darcy v. Hall, ii. 187 Darcy v. Holderness, ii. 242 Darlington (Earl of) v. Pulteney, 1. 321. 323 Darly v. Darly, i. 107

0

Darrel v. Molesworth, ii. 364. 367 Darston v. Earl of Orford, ii. 401, 402.407 Dashwood v. Blighway, ii. 282 Davenish v. Baynes, ii. 38 Davenport v. Oldis, ii. 66 Davenport v. Hanbury, ii. 345 Davers v. Dewes, ii. 129 Davers v. Folkes, ii. 193 Davie v. Beardsham, i. 218 Davidson v. Foley, ii. 112 Davis v. Austin, i. 74 Davis v. Gardner, ii. 292 Davis v. Glofter, ii. 478 Davis v. Hatton, 1. 260 Davis v. Mason, i. 265 Davis v. Pearce, ii. 449 Davis v. Speed, ii. 56. 93. 135 Davis v. Weld, ii. 174 Davy v. Davy, i. 155. 159 Davy v. Nichols, i. 195 Daw v. Newborough, ii. 46 Dawes v. Ferrers, i. 429 Dawson v. Killett, ii. 204. 366 Day v. Hungate, i. 53 Dean of Christ Church v. Barrow, 11. 343 Dean v. Dalton, ii. 127 Dean v. Izard, i. 187 Dear v. Roston, i. 131 Debeze v. Mann, ii. 349 Deerly v. Duchess of Mazarine, i. 108 Deeze, ex parte, il. 275 Deg. v. Deg, ii. 36. 119. 400 Deguilder v. Depeister, i. 154 Deighton v. Granvill, ii. 163 Delabeere v. Bedingfield, i. 292 Delemere's Case, ii. 8. 30 Delmare v. Rebello, i. 118. ii. 341 Delver v. Hunter, i. 14 Demainbrey v. Metcalte, ii. 275 Denn v. Bagshaw, ii. 59. 63 Denn v. Puckey, ii. 90. 95 Denton v. Stewart, i. 42. 176. 180. ii. 438 Dethwicke v. Banks, i. 287 Dethwicke Ll 2

Dethwicke v. Caravan, ii. 397 Devenish v. Baines, 1. 69. ii. 38 Devon (Duke of) v. Atkins, ii. 370. Dicks v. Strutt, i. 99. ii. 315. 405 Digby v. Legard, ii. 118 Digby v. Morgan, ii. 147 Digge's Cafe, ii. 157. 162 Dimmock v. Atkinson, i. 96 Dixon v. Dixon, i. 30 Dixon v. Saville, ii. 100. 112 Dod v. Dickenson, ii. 79 Dodd v. Dodd, i. 404 Dodfley v. Kinnersley, i. 30. 150 Dodfwell v. Nott, ii. 455 Doe v Aplyn, ii. 58. 69 Doe v. Burmfall, ii. 95 Doe v. Butcher, i. 143 De v. Carlton, ii. 91 Doe, on demife of Bristow, v. Pegg, 11. 110 Doe, on demise of Lancashire, v. Lancashire, ii. 356 Doe v. Fonnereau, ii. 93, 94. 108 Doe v. Fyldes, ii. 55 Doe v. Halley, ii. 58 Doe v. Holmes, ii. 57. 95 Doew. Laming, i. 146. 408. 412 Doe v. Lyde, ii. 80 Doe v. Pott, ii. 110 Doe v. Routledge, i. 25. 269. 271. Doe v. Sandham, i. 375. 377 Doe v. Staple, i. 112. 310. 11. 111 Doe v. Woodhouse, ii. 53. 54 Dolman v. Pritman, ii. 424 Donegal's (Lord) Cafe, i. 62, 63, 64 Donne v. Lewis, ii. 292 Doran v. Rofs, i. 200 Dorison v. Westbrook, i. 31. 130 Dormer's Cafe, i. 5 Dormer v. Packhurft, i. 434 Dormer v. Fortescue, i. 14. 158.161 Dormer v. Thurland, i. 194 Dorfet v. Giadler, i. 11. 42 Douglas v. Vincent, i. 109 Douglas v. Ward, i. 279

Dowman's Case, ii. 39, 40, 41 Downe v. Morton, i. 38. 369 Downing College' Cafe, ii. 216 Dowfe v. Derival, i. 287. ii. 114 Dowfet v. Sweet, i. 118. 427 Dowtie's Cafe, ii. 40 Doyley v. Attorney General, ii. 216 Doyley v. Purfull, i. 314 Drake v. Robinson, i. 38. 349 Draper v. Borlace, i. 161 Draper's Cafe, i. 269. ii. 102 Drapers' Company v. Davis, ii. 425 Drapers' Company v. Yardley, ii. 151.301.469 Drinkwater v. Falconer, ii. 362 Drury v. Drury, i. 19 Drury v. Hooke, i. 264 Drybutter v. Bartholomew, i. 141 Dubois v. Hole, i. 108 Duckenfield v. Whichcott, i. 374 Dudley v. Dudley, ii. 112. 307 Dunch v. Kent, ii. 151 Dulwich Col. v. Davis, i. 153 Dulwich Col. v. Johnson, ii. 377 Duncomb v. Duncomb, ii. 78 Duncomb v. Walters, ii. 377 Duncumben v. Sturt, ii. 315 Dundas v. Dutens, i. 98 Dungannon (Earl of) v. Hackett, ii. 442 Dunfany (Lord) v. Plunkett, ii. 427 Duplin v. Deroven, ii. 401 Durant v. Prestwood, ii. 389 Durnford v. Lane, i. 75 Durour v. Motteaux, i. 422. ii. 208 Durston v. Sandys, i. 232 Dutton v. Ingram, ii. 55 Dutton v. Poole, i. 69 Dewal v. Price, ii. 427 Dyer v. Browne, i. 451 Dyer v. Dyer, i. 191. 161. ii. 121 E

Facles v. England, ii. 36. 364 Eales v. England, ii. 169

Eames

1

E

F

E

F

E

E

E

E

E

E

E

E

E

E

E

E

E

Eq Eq

El

El

El

El

El

El

Ell

EII

EI

El

EII

Ell

Eames v. Hancock, ii. 203 Earlom v. Sanders, i. 425. ii. 192 Earle v. Peale, i. 73. 91 East v. Thornbury, i. 117 East India Company v. Blake, i. 152 East India Company v. Evans, ii. 456. 492 East India Company v. Sandys, ii. Eastwood v. Vincke, ii. 322. 327. 332 Eaton v. Lyon, i. 435 Eaton v. Jaques, i. 357 Eaton College v. Beauchamp, i. 155 Ebrand v. Dancer, ii. 123 Eccleston v. Pally, i. 195 Eddowes v. Hopkins, ii. 424 Eden v. Earl of Bute, i. 122 Eden v. Chalkey, ii. 464 Edge v. Salisbury, ii. 345 Edlin v. Bately, i. 188 Edmunds v. Brown, i. 307 Edmunds v. Povey, ii. 303 Edsell v. Buckannon, ii. 264. 266 Edwards v. Countess of Warwick, i.

385.421 Edwards, ex parte, il. 246 Edwards v. Freeman, ii. 287. 371 Edwards v. Slater, ii. 156 Edwards v. Townshend, i. 95 Edwin v. East India Company, 1. 38 Egleton's Cafe, ii. 243 Ekins v. East India Company, i. 241. ii. 440 Eldridge v. Knott, i. 329 Elliot v. Davenport, it. 365 Elliett v. Davis, il. 427 Elliott v. Elliott, ii. 122 Elliott v. Hill, i. 325 Elliott v. Merryman, ii. 148 Ellis v. Ellis, i. 43. 11. 232

Ellis v. Greaves, ii. 283 Ellis v. Atkinfon, i. 103 Ellis v. Lloyd, i. 431

Ellis ex parte, ii. 380

Ellisv. Walker, ii. 369. 372 Ellison v. Airey, ii. 91. 346 Ellison v. Cookson, ii. 349
Elmsley v. Macauley, i. 42
Elton v. Elton, ii. 123
Ely, Bishop of, v. Kenrick, i. 19
Emblyn v. Freeman, ii. 118
Emery v. Martin, ii. 203
Emperor v. Wolfe, ii. 204
Endsworth v. Griffith, ii. 26z
Englesield's Case, ii. 39. 234
Englesield v. Englesield, i. 139. ii.

English v. Ord, ii. 213
Errington v. Annesley, i. 30. 149
Evans v. Llewellyn, i. 116
Evelyn v. Evelyn, ii. 287
Evelyn v. Templar, i. 281
Everard v. Warren, ii. 460
Evroy v. Nicholas, i. 76. 161
Eure v. Howard, ii. 142
Ewer v. Corbett, ii, 149
Eyre v. Countess of Shaftsbury, ii.

Eyre's Cafe, i. 425 Eyro's Cafe, i. 425 Eyton v. Eyton, ii. 465

F

Fagg's (Sir John) Cafe, ii. 304
Fairbeard v. Bowers, i. 290
Falkland, Lord, v. Bertie, i. 90.
210. ii. 205. 269
Fane v. Duke of Devonshire, i. 68
Fane v. Fane, i. 449. ii. 356
Farmer's Cafe, i. 173. ii. 450
Farmer v. Arundell, ii. 5
Farnham v. Atkins, i. 139
Farnham v. Phillips, ii. 349
Farrington v. Knightly, ii. 129.
314
Fawett v. Gee, i. 267
Fawell v. Heelis, i. 381
Fawkner v. Fawkner, ii. 56
Fawtry v. Fawtry, ii. 387

Feise v. Randell, i. 267

Fells v. Read, i. 31

Fellowes

Fellowes v. Owen, ii. 181 Feltham's Cafe, ii. 293 Feltham v. Cudworth, i. 211 Fereyes v. Robertson, ii. 79. 286 Ferres v. Ferres, 1. 52 Ferrars v. Cherry, ii. 148. 151. 301 Ferrars v. Fermor, 1. 436 Ferrars v. Ferrars, i. 159. ii, 425 Fettiplace v. Gorge, i. 96. 107 Feversham v. Waison, i. 391. 394 Filmer v. Gott, i. 68. ii. 29 Finch's (Sir Moyle) Cafe, i. 427 Finch v. Finch, ii. 326 Finch v. Tucker, i. 299 Finch v. Earl of Salisbury, i. 356 Finch v. Earl of Winchelsea, i. 37. 367. 11. 167 Finner v. Longland, i. 289 Firebrass v. Brett, i. 236 Fisher v. Prosser, i. 329 Fisher v. Wigg, ii. 51. 50 Fisk v. Fisk, ii. 283 Fitzgerrald v. Falconbridge, ii. 154. 161 Fitzroy v. Gwillim, i. 246 Fitzwilliam's Cafe, il. 49. 158 Fletcher's Cafe, i. 213 Fletcher v. Fietcher, i. 107. 212 Fletcher v. Sedley, i. 276 Flood's Cafe, ii. 139. 210 Floyd v. Buckland, i. 180 Floyd v. Manfell, ii. 266 Floyer v. Edwards, i. 243. 255 Floyer v. Levington, 11. 262. 287 Floyer v. Sherrard, i. 127. 244 Focus v. Lord Salisbury, ii. 470 Foley v. Percival, i. 218 Fonnereau v. Fonnereau, ii. 367 Fonnereau v. Poyntz, i. 118. 201. 427. ii. 476 Forbes v. Rofs, ii. 185 Ford v. Compton, i. 190 Ford v. Fleming, ii. 362 Ford v. Gray, ii. 465 Ford v. Perring, ii. 486 Fordyce, Lady, v. Willis, i. 226. ii.

Forrester v. Cotton, ii. 326 Forrester v. Leigh, ii. 288. 300 Forse and Hembling's Case, i. 50 Foster v. Cooke, ii. 298 Foster v. Denny, ii. 230. 236. 339 Foster v. Forster, ii. 32 Foster v. Merchant, i. 59 Foster v. Munt, ii. 122. 126. 128 Foster v. Vassal, i. 34 Forth v. Chapman, ii. 324 Fotherby v. Hartridge, i. 331 Fothergill v. Fothergill, i. 322 Fothergill v. Kenrick, ii. 302 Fotheringham v. Greenwood, ii. 461 Fountain v. Caine, i. 82 Fountain v. Grimes, i. 241 Fowell v. Heelis, i. 153 Fowler v. Fowler, i. 104. ii. 313. 327 Fowler v. North, ii. 159 Fox's Cafe, ii. 45 Fox v. Crane, i. 301 Fox v. Macreth, i. 122. 135. 162 Foxcroft v. Lifter, i. 180. 189 Foy v. Hinde, ii. 81 Frank v. Frank, i. 117 Franklin v. Earl of Burlington, ii. Franklin v. Frith, ii. 185 Franklin v. Green, ii. 173 Franklin v. Thornbury, i. 143. 274 Frazer v. Moor, ii. 264 Freak v. Lee, ii. 54 Frederick v. Frederick, i. 287, 288. Freeman v. Bishop, i. 134 Freeman v. Hurst, i. 79 Freemoult v. Dedire, i. 284. 367. 11. Freestone v. Rant, i. 350. ii. 31 French v. Baron, ii. 177 French v. Chichester, ii. 286. 293 Frewin v. Charlton, ii. 173 Frewin v. Rolfe, ii. 102 Frogmorton v. Holliday, ii. 54 Fry v. Porter, i. 259. 400. 11. 259 Fulham v. Jones, i. 421. ii. 192 Fulthorpe

G

G

Fulthorpe v. Forster, ii. 262
Fulwood's Case, i. 213
Fursaker v. Robinson, i. 350. ii. 31.

124
Fytche v. Bishop of London, i. 231

G

Gainsborough, Lady, v. Gifford, i. Gainsborough v. Gainsborough, i. 201. 11. 127. 286. 475 Gale v. Lindo, i. 266. 268, 269 Galton v. Hancock, ii. 291 Galway v. Ruffel, ii. 427 Gardner v. Pullen, 1. 31. 130. 432 Gardner v. Griffith, ii. 257 Gardner v. Sheldon. ii. 53. 58 Garforth v. Bradley, 1. 314 Garforth v. Hearon, i. 226 Garnish v. Wentworth, ii. 32 Garret v. Pritty, i. 260, 261 Garth v. Baldwin, ii. 79 Gartfide v. Isherwood, i. 128 Gascoigne v. Sidwell, ii. 492 Gascoigne v. Theving, ii. 117. 123 Gastrill v. Baker, ii. 214 Gawler v. Standiwicke, ii. 202 Geast v. Barber, ii. 494 Geary v. Bearcroft, ii. 169, 170 Gee v. Spencer, 1. 116. 124 Geoffrey v. Thorn, i. 332 George's Cafe, ii. 326 Gerrard v. Gerrard, ii. 201. 203 Gibbons v. Moulton, i. 91 Gibbs v. Herring, ii. 182 Gibson v. Albert, ii. 461 Gibson v. Kinwen, ii. 198 Gibson v. Lord Montfort, i. 218 Gibson v. Paterson, i. 392 Gibson v. Scuddamore, ii. 323 Gifford v. Gifford, i. 267 Gifford v. Manly, ii. 170 Gilbert v. Witty, ii. 56 Giles v. Hooper, i. 145 Gill v. Attorney General, ii. 181 Gillam, ex parte, i. 61

3.

11.

38.

11.

Gilmore v. Severne, ii. 347 Girling v. Lee, i. 283. ii. 397 Gladman v. Hinchman, ii. 434 Glanville v. Jennings, 1. 264 Glanville, Lady, v. Duchess of Beaufort, i. 201. ii. 127. 130 Glaffcock v. Brownell, 1. 211 Gleg v. Gleg, i. 205 Glenarchy v. Boswell, i. 407. 411. Glub v. Attorney General, ii. 213 Glyn v. Harding, ii. 37 Gobfal v. Sounden, ii. 126 Goddard v. Complin, i. 444 Goddard v. Garrett, i. 249 Goddard v. Keate, i. 258. 260 Godfrey v. Watson, ii. 176. 304. Godolphin, Earl of, v. Pennick, ii. Godolphin v. Godolphin, ii. 82 Godwin v. Godwin, ii. 346 Godwin v. Lister, i. 83 Godwin v. Munday, ii. 203 Godwin v. Winfmore, ii. 99, 100 Gofton v. Mill, i. 283 Going v. Radford, ii. 163 Goldsmith v. Browning, 1. 203 Goman v. Salisbury, i. 392 Gooch's Cafe, i. 277. 281 Good v. Elliott, i. 236 Goodall v. Harris, ii. 230 Goodall v. Rivers, ii. 200 Goodfellow v. Burchett, ii. 408 Gooder v. Lake, ii. 465 Goodison v. Nunn, i. 390. 392 Goodman v. Goodright, ii, 91. 93 Goodrick v. Brown, 11. 470 Goodright v. Cator, ii. 161 Goodright v. Cornish, ii. 91 Goodright v. Durham, ii. 95 Goodright v. Glazier, ii. 361 Goodright v. Humphreys, i. 143 Goodright v. Pullen, i. 407 Goodright v. Sales, ii. 105 Goodright v Searle, i. 220 Goodright v. Strahan, i. 141 Goodright

Goodright, ex dem. Tyrrell, v. Mead, i. 444 Goodright v. White, i. 428 Goodtitle v. Billington, ii. 97 Goodtitle, ex dem. Cross, v. Wadhald, ii. 61 Goodtitle v. Knot, 11. 110 Goodtitle v. Morgan, i. 164 Goodtitle v. Otway, i. 198 Goodtitle v. Stokes, ii. 51 Goodtitle v. Welford, ii. 460 Goodwin, ex parte, 1. 157 Goodwin v. Gibbons, i. 297 Goodwin v. Goodwin, i. 274. 321. Gordon v. Raynes, ii. 203. 366 Gore v. Gore, ii. 93, 94 Gore v. Knight, i. 96. 107 Gorge's Cafe, ii. 236 Gorges v. Chancey, 1. 95 Goring v. Bickerstaff, i. 214. ii. 110 Goring v. Nash, i. 350. ii. 31 Goss v. Tracy, ii. 317 Gould v. Fleetwood, ii. 168. 175 Gower v. Grosvenor, i. 407. ii. 82 Gower v. Hancock, i. 100 Gower v. Mainwaring, ii. 206 Gower v. Mead, ii. 286 Goylmer v. Padiston, i. 213 Graham v. Stamper, 1. 297 Graham v. Londonderry, i. 107 Grandison, Lord, v. Countess of Dover, 11. 383 Granville, Lady, v. Duchess of Beaufort, ii. 126, 127, 128 Granville v. Payne, i. 204 Gratwick v. Simpson, i. 332, 333 Gravenor v. Hallum, ii. 141. 223 Graves v. Earl of Salisbury, ii. 349 Graves v. Mattison, ii. 199. 201 Graves v. Powell, ii. 397 Gray v. Heskith, i. 232 Gray, Lord, v. Lady Gray, ii. 121. Gray v. Matthias, i. 228 Graydon v. Hicks, i. 221. 260. 262. Habergham v. Vincent, i. 198. il. 11.127

Grayfon v. Atkinfon, i. 192. 196. 11. 213 Green v. Belchier, i. 447. 11. 431 Green v. Ekins, 1. 405 Green v. Howard, ii. 345 Green v. Proud, ii. 466 Green v. Rod, ii. 79. 319 Green v. Symonds, ii. 329 Green v. Smith, i. 219 Green v. Wood, i. 30 Greenhill v. Greenhill, i. 218. 420 Greenhill v. Waldoe, ii. 426. 431 Greenley's Cafe, i. 311 Greenfide v. Benfon, ii. 415 Greenwood, i. 349 Greenwood v. Hare, i. 350 Gregory v. Molesworth, 1. 81 Grefcot v. Green, i. 355 Greysbrook v. Fox, ii. 377 Greyson v. Atkinson, ii. 213 Grieves v. Cafe, ii. 208. 213 Griffith v. Hood, i. 94 Griffith v. Jones, ii. 346 Griffith v. Rogers, ii. 130 Grigby v. Cox, i. 95. 112 Grimmett v. Grimmett, ii. 213 Grimstone, ex parte, 1. 56. 59 Grimstone v. Bruce, i. 395 Grisley v. Lother, i. 260. 263 Gryle v. Gryle, i. 193 Guidott v. Guidott, i. 420. ii. 191 Guillam v. Holland, ii. 438 Gulliver v. Wickett, ii. 91 Gulfton v. Gulfton, ii. 100 Gumley v. Fontlenoy, ii. 483 Gunter v. Holfey, i. 179. 186 Gurnell v. Wood, i. 214 Guth v. Guth, i. 195 Gwynn v. Eaton, i. 127. 134. 135. Gwynn v. Hook, i. 430

48. 365

Had

Haddock's Cafe, i. 308 Hale v. Hardy, i. 293 Hale v. Thomas, ii. 426 Hale v. Webb, i. 372 Hales v. Cole, i. 185 Hale v. Dunch, ii. 67 Hales v. Hales, i. 332 Halfhide v. Fenning, ii. 259 Halfpenny v. Ballett, i. 170 Halifax v. Higgins, i. 398 Hall v. Atkinfon, ii. 488 Hall v. Beane, i. 38 Hall v. Brooker, ii. 285 Hall v. Carter, ii. 199 Hall v. Hall, i. 277. 289 Hall v. Hardy, i. 293 Hall v. Kendall, ii. 397 Hall v. Noyes, ii. 484 Hall v. Potter, i. 263 Hale v. Rifley, ii. 144. 146 Hallett v. James, i. 79 Hallifax v. Higgins, i. 398 Hamerton v. Mitton, 1. 279 Hamerton v. Rogers, ii. 300 Hamilton v. Mohun, i. 134. 262. ii. 112 Hamilton v. Worley, ii. 292 Hammond v. Jones, i. 290 Hampshire v. Pearce, i. 117 Hampson v. Lady Sydenham, i. 80 Hampton v. Spencer, 11. 38 Hanby v. Roberts, ii. 329. 298 Hanbury v. Hanbury, 11.324 Hancock v. Hancock, i. 287. 421 Hands v. Hands, ii. 345 Hands v. James, i. 195 Hanger v. Eyles, i. 370 Hankin v. Middleditch, i. 11 Hannis v. Parker, i. 198 Hardham v. Roberts, 1. 350 Harding v. Edge, 11. 407 Harding v. Glynn, ii. 345 Harding v. Nelthorpe, i. 374 Hardingham v. Nichol, ii. 148 Hardwick v. Mynd, ii. 372 Hare v. Groves, i. 379 Hare v. Sherwood, i. 200. 245 Vol. II.

Hargthorp v. Rutford, ii. 316 Hargrave v. Tindall, ii. 398 Harkness v. Bayley, ii. 64 Harland v. Trigg, ii. 37 Harman v. Camm, i. 118 Harman v. Vanhatten, i. 255 Harnard v. Webster, ii. 177 Harrington v. Duchattel, i. 225 Harris v. Barnes, ii. 91. 213 Harris v. Ingledew, i. 349. ii. 400. Harris v. Du Beavoir, i. 206 Harris v. Lee, i. 74. 91 Harrison v. Buckle, i. 96 Harrison v. Forth, ii. 148 Harrison v. Lord North, i. 376. 383 Harrison v. Naylor, ii. 202 Harrison v. Rowley, ii. 381 Harrison v. Southcote, i. 10. ii. 485 Harrison's Case, ii. 401, 402 Hartop's Cafe, i. 174. ii. 24 Hartop v. Whitmore, ii. 349 Hartwell v. Chitters, ii. 399 Harvey v. Ashley, i. 74.80 Harvey v. Aston, i. 259, 260. ii. Harvey v. Desbouverie, i. 290 Harvey v. East India Co. i. 304 Harvey v. Harvey, i. 106. 323. ii. 232. 472 Harvey v. Montague, ii. 152 Hascard v. Dr. Somany, i. 306 Hatchet v. Baddeley, i. 98 Hatton v. Gray, i. 176 Hatton v. Long, i. 391 Hatton v. Nichol, ii. 400 Havergill v. Hare, i. 436 Haughton v. Harrison, ii. 346. 431 Hawes v. Leader, 1. 274 Hawes v. Wyatt, i. 139. 201 Hawkins v. Holmes, i. 176 Hawkins v. Leigh, i. 38 Hawkins v. O'Been, i. 84 Hawkins v. Chapple, ii. 168 Hawkins v. Taylor, i. 320. ii. 303 Hawkins v. Turner, i. 231 Haws v. Haws, ii. 68, 69 Mm Hay

Hay v. Palmer, i. 385 Haycock v. Haycock, i. 438 Hayes v. Caryl, i. 393 Hayes v. Warren, i. 345 Haynes v. Mico, ii. 327 Haynes v. Villers, ii. 143 Haytor v. Rod, ii. 112 Hayward v. Angel, i. 395. 399 Hazlewood v. Pope, i. 349. 351. ii. 286. 293. 400 Head v. Egerton, i. 166 Head v. Head, i. 105 Heams v. Bance, ii. 272. 273 Heard v. Stamford, i. 99. 161 Hearle v. Greenbank, i. 83. 95. 107: ii. 431 Hearne v. Allen, i. 434. ii. 64 Hearne v. Meyrick, ii. 299. 373 Heath v. Heath, ii. 346 Heath v. Parry, ii. 370. 431 Heathcot, Baronet, v. Flute, ii. 482 Heathcot v. Paignon, i. 127, 128. 248 Heaton v. Haffell, i. 100 Hebblethwaite v. Cartwright, i. 147. 11. 199 Hedges v. Hedges, i. 287 Hele v. Bond, ii. 156 Heli in re, i. 54 Helier v. Jennings, i. 197 Hemmings v. Minchley, i. 260 Henn v. Hanson, i. 442 Henby v. Philips, i. 112 Henkle v. Royal Exchange Affurance, i. 117 Henley v. Acton, ii. 127. 132. 371. Hensloe's Case, ii. 311. 376, 377. 381 Herbert's Cafe, ii. 230 Herbert v. Herbert, i. 96. 107 Herbert v. Lownes, i. 69 Herne v. Herne, i. 139 Herne v. Meers, i. 128 Heron v. Newton, ii. 130 Herring v. Brown, i. 437 Herbert v. Fream, i. 301 Hervey v. Dinwoody, i. 330 Hethersell v. Hales, ii. 176

Hewitt v. Ireland, i. 147 Hewitt v. Wright, i. 422. ii. 118 Haycock v. Haycock, i. 447 Heydon's Cafe, i. 29 Hibbert v. Rolleston, ii. 48 Hibblethwaite v. Cartwright, ii. 199 Hicks v. Phillips, i. 121. 379 Hicken v. Hicken, i. 352 Hicks v. Pendarvis, i. 260 Higden v. Williamson, i. 214 Higford v. Higford, ii. 112 Higgins v. Crawford, i. 331 Higgins v. Calamy, ii. 302 Higgins v. Dowler, ii. 107 Higgins v. Grant, i. 454 Higham v. Baker, ii. 65, 66 Higham, ex parte, i. 96 Highway v. Banner, i. 405 Hill v. Adams, ii. 113 Hill v. Bowyer, ii. 118 Hill v. Brewer, ii. 195 Hill v. Carr, i. 144. 301 Hill v. Chapman, i. 289. ii. 346 Hill v. Mills, ii. 380 Hill v. Spencer, i. 228 Hill v. Turner, ii. 315, 316 Hill v. Wiggett, i. 200. ii. 472 Hillier v. Tarrent, i. 38 Hills v. University of Oxford, i. 33 Hilton v. Briscoe, i. 274 Hilyard v. Stapleton, i. 232 Hinchliffe v. Hinchliffe, ii. 323 Hine v. Dod, i. 25 Hincks, ex parte, i. 50 Hinton v. Hinton, i. 292. 371 Hinton v. Parker, ii. 414 Hinton v. Pincke, ii. 370 Hinton v. Scott, i. 97. 274 Hinton v. Toye, i. 326 Hitchcock v. Sedgwick, ii. 304 Hix v. Attorney General, ii. 170 Hixon v. Witham, i. 283 Hobart v. Hobart, i. 127. ii. 30 1 Hobbs v. Hull, i. 109 Hobbs v. Norton, i. 161 Hobson v. Trever, i. 152. 215 Hockley v. Mawley, ii. 108 Hodge

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

H

He

He

H

Ho

Hodge, v. Clare, ii. 382 Hodges v. Everard, 1. 44 Hodges v. Steward, i. 347 Hodges v. Waddington, ii. 372 Hodgkins v. Robson, i. 386 Hodgson v. Ambrose, i. 409 Hodgson v. Bussey, ii. 80 Hodgson v. Caldcot, ii. 476 Hodgson v. Rawson, ii. 203 Hodsden v. Lloyd, i. 112 Hoe's Case, i. 441 Holcrofs, Lady, v. Smith, ii. 405 Holder v. Chambury, i. 159 Holford v. Hatch, i. 357 Holford v. Holford, i. 279 Holford v. Wood, ii. 350 Hollis v. Wyfe, i. 398 Hollingshead v. Hollingshead, i. 76. 78. 84, 85. 322 Hollis v. Whiting, i. 187 Holmes v. Maynell, ii. 56 Holmes v. Willett, i. 450 Holstcomb v. Rivers, ii. 458 Holt v. Clarencieux, i. 80. 139 Holt v. Holt, i. 443. ii. 127. 187 Holt v. Ward, i. 80 Holtham v. Ryland, i. 153 Honor v. Honor, i. 202. 404 Hooker v. Hooker, ii. 78 Hooley v. Hatton, ii. 350 Hopkins v. Hopkins, ii. 15.97 Hore v. Dix, ii. 20. 24. 33. 39. 44 Horne v. Baker, i. 33 Hornsby v. Finch, ii. 128 Hornfby v. Hornfby, ii. 344. 364 Horrell v. Waldron, ii. 315 Horsley v. Chaloner, ii. 346 Horton v. Horton, 1. 450. 11. 56, 57. 65 Hoskins v. Hoskins, ii. 130 Hoste v. Pratt, ii. 346 Hotham v. East India Company, i. 38. 389. 391 Hough v. Williams, i. 135 House v. Lord Petre, ii. 378 Hovey v, Blakeman, ii. 181 Howard v. Harris, ii. 260. 268. 433

Howard v. Hooker, i. 108. 269 Howard v. Howard, ii. 315 How v. Weldon, i. 135 How v. Godfrey, ii. 175 Howe v. Howe, ii. 118 Howell v. Hanforth, i. 386 Howell v. Howell, i. 405 Howell v. Price, ii. 278. 286 Howlett v. Strickland, i. 390 Howman v. Corey, i. 318 Hubert v. Parsons, ii. 367 Hucks v. Hucks, ii. 83 Hudson v. Hudson, i. 105 Hudson v. Middleton, i. 36 Hughes v. Doulben, i. 448 Hughes v. Hughes, ii. 233 Hulme v. Tenant, i. 95. 107. 109 Humberston v. Humberston, ii. 82 Hume v. Edwards, ii. 373 Humble v. Bell, ii. 149 Humphreys v. Humphreys, i. 332 Humphreys v. Knight, i. 430 Hungerford v. Earl, i. 10. 276. 284 Hungate's Cafe, ii. 467 Hungerford v. Goring, ii. 488 Hungerford v. Hungerford, i. 42 Hunlock v. Blacklowe, i. 390 Hunfden's Cafe, i. 16 Hunsden v. Cheney, i. 161 Hunt v. Baker, ii. 107 Hunt v. Cope, i. 382 Hunt v. Gateler, i. 444 Hunt v. Hort, ii. 478 Hunt v. Hunt, i. 95 Hunt v. Matthews, i. 269. 279 Hunt v. Wotton, i. 345 Hunter v. Potts, i. 439 Huntingdon, Earl of, v. Granville, ii. 304 Huntingdon v. Huntingdon, i. 102 Huntingdon's (Lord) Cafe, ii. 289 Huffey v. Jacob, i. 235 Hutchison v. Hammend, ii. 185 Hutchins v. Foy, ii. 203, Hutton v. Simpson, i. 158. ii.57 Huxford v. Carpenter, i. 186 M m z

dge

99

Hyde v, Dean and Canons of Windfor, i. 353
Hyde v. Hyde, i. 198. ii. 164
Hyde v. Parrott, ii. 319
Hyde v. Seymour, ii. 195
Hylton v. Hylton, i. 134. 262

I and J

Jackson v. Duchaire, i. 266 Jackson v. Hurlock, ii. 65. 221. 351, 252 Jackson v. Jackson, i. 37.85. 367 Jackson v. Lamas, i. 267 Jackson v. Lever, i. 133. 371 Jacobson v. Williams, i. 98 Jacques v. Golightly, i. 245. ii. 6 Jacques v. Withy, ii. 6 James v. Blunck, i. 353 James v. Graves, i. 66. 68 James v. Owen, i. 132 Tames v. Stailes, i. 267 Tarvis v. Duke, i. 123 Ibbetson v. Rhodes, i. 162 Ibbetson v. Lord Galway, i. 51 Idle v. Cooke, ii. 51. 55 Jeacock v. Falkner, ii. 327 Teal v. Titchenor, ii. 203. 367 Jebb v. Abbott, ii. 149 Tefferies v. Austin, i. 344 Jefferies v. Baldwin, i. 33 Tefferies v. Small, ii. 108 Teffs v. Wood, ii. 323 Jenkins v. Keymes, i. 301 Jenkins v. Powell, ii. 349 Jenkins v. Young, ii. 143 Jenner v. Harper, ii. 210 Jenner v. Morgan, i. 384 Jenner v. Tracy, ii. 264 Jennings v. Looks, ii. 202 Jennings v. Moore, i. 37. 349. ii. Jennings v. Sellack, i. 279. ii. 121 Jennings v. Ward, ii. 260 Jerrard v. Sanders, ii. 487 Jervis v. Duke, i. 121. 260

Jesson v. Jesson, ii. 349 Jesson v. Brooks, i. 244. 254 lesus Col. v. Bloom, i. 14. ii. 494 Jesus Col. Case, ii. 209 Jevon v. Bush, i. 83. 11. 427 Jewson v. Moulson, i. 97. 99. ii. 315 Inchinquin, Lord, v. O'Brian, ii. 286 Incledon v. Northcote, ii. 313. 431 Ingram v. Bray, i. 442 Innes v. Baugh, i. 274 Inword v. Twyne, i. 88. John de Mandeville's Case, ii. 72 Sir John St. Alban's Case, i. 85 John, St. v. Holford, ii. 271 John, St. v. Turner, i. 333. ii. 266 Johns v. Rowe, ii. 387 Johnson v. Medlicot, i. 67 Johnson v. Morris, i. 308 Johnson v. Ogilby, i. 296 Johnson v. Pie, i. 77 Johnson v. Twift, ii. 130 Joliffe v. Crew, ii. 430 Joliffe v. East, ii. 102 Jones v. Barkley, ii. 6 Iones v. Beale, ii. 346 Jones v. Berkley, i. 389 Jones's Cafe, i. 122 Jones v. Crawley, i. 65 Jones v. Goodchild, ii. 389 Jones v. Jukes, ii. 402 Jones v. Lake, i. 195 Jones v. Laughton, i. 404 Jones v. Marth, i. 273. 279. 282 Jones v. Turberville, i. 331 Jones v. Meredith, ii. 268 Jones v. Morgan, i. 403. 412. 418. 430. 11. 52. 71. 163 Jones v. Morey, ii. 9. 21. 42 Jones v. Peacocke, ii. 226 Jones v. Perry, i. 220 Jones v. Powell, i. 290. 346 Jones v. Ld. Say and Seale, ii. 17. Jones v. Lord Sefton, ii. 329

Jones

Jesson v. Essington, ii. 330

Jones v. Silby, i. 386
Jones v. Smith, ii. 275
Jones v. Westcombe, ii. 130
Jordan v. Savage, i. 74
Jordan v. Sawkins, i. 190
Jory v. Cox, i. 398. ii. 257
Joseph v. Mott, ii. 407
Joslin v. Brewett, ii. 129
Joy v. Kent, i. 253
Joynes v. Statham, i. 122. 200. ii. 262
Irnham (Ld.) v. Child, i. 123, 124.

Irod v. Hurst, ii. 349 Isaac v. De Friez, ii. 345 Iseham v. Morrice, ii. 12 Ithell v. Beane, ii. 148 Ivy v. Gilbert, i. 447 Ivy v. Ivy, ii. 486

K

Keye v. Bolton, i. 267 Keble v. Thompson, ii. 181 Keat v. Allen, i. 260 Keeche v. Hall, ii. 258. 268 Keech v. Sandford, ii. 187 Keene v. Stukeley, i. 126. 130. 391 Kelly v. Berry, i. 302. ii. 488 Kelly v. Lord Bellew, ii. 435 Kelly v. Pawlett, ii. 339 Kemp v. Coleman, i. 262 Kemp v. Davy, ii. 203 Kemp v. Kelfey, i. 286 Kempland v. Courtney, i. 214. 219 Kender v. Milward, ii. 119 Kenge v. Delaval, i. 96 Kennedy v. Stainsby, ii. 129 Kenrick v. Branfby, i. 70. ii. 495 Kent, ex parte, ii. 232 Kent v. Allen, i. 262 Kent v. Bridgeman, i. 17 Kennett v. Norman, i. 51 Kentish v. Newman, i. 146. 442 Kerman v. Johnson, ii. 53 Kerrick v. Brensby, i. 13. ii. 317. 494

418.

ones

Kersley v. Duck, i. 174 Kettle v. Townsend, i. 38. ii. 123 Kettleby v. Atwood, i. 420. 423 Key v. Bradshaw, i. 259 Key v. Gamble, ii. 46. 76 Kibbett v. Lee, i. 321. ii. 160. Kidney v. Coussmaker, ii. 400 Kightley v. Kightley, ii. 402 Kildare v. Eustace, ii. 139 Kilmury's Cafe, i. 260 Kilvington v. Harrison, i. 79 King v. Brewer, i. 111 King v. Burchell, i. 407 King v. Cotton, i. 108. 269 King, ex parte, ii. 272 King v. King, ii. 278. 400. King v. Marriffal, ii. 268 King v. Corporation of Rippon, i. King v. Larwood, i. 307 King v. Newman, ii. 210 King v. Melling, ii. 55. 60. 68 King v. Rippon, i. 307 King v. Raines, ii. 464 King v. Withers, i. 214. 439. ii. 204. Kingdome v. Bridges, i. 276. ii. 124 Kingsland v. Ld. Tyrconnel, i. 331 Kingsman v. Kingsman, i. 181 Kingsmel, ex parte, i. 58 Kingston (Mayor of) v. Horner, 1. 329 Kingston (Earl of) v. Pierrepoint, 1. 225 Kingston v. Preston, i. 390 Kirk v. Clark, i. 94 Kirk v. Webb, ii. 36. 119 Kirkman v. Kirkman, ii. 324 Kirkman v. Smith, i. 309 Kirsley v. Duck, ii. 40 Kirwan v. Blake, i. 123. ii. 427. Knapp v. Noyes, i. 262 Knapp v. Powell, ii. 430 Knight v. Adams, i. 330 Knight v. Atkins, i. 421 Knight v. Cole, i. 442 Knight

Knight v. Ellis, ii. 57. 80. 108 Knight v. Freeman, i. 359 Knight v. M. Lean, ii. 427 Knipe v. Jessen, ii. 186 Knipe v. Palmer, i. 59 Knowles v. Spence, ii. 266

L

Lacon v. Martins, i. 180, 181. 186 Lacy v. Whatston, i. 201 Lade v. Holford, ii. 110 Lake v. Gibson, ii. 103 Lake v. Lake, i. 202. ii. 126 Lake v. Thomas, ii. 266 Lamlee v. Hanman, i. 262, 266 Lampert v. Lampert, i. 94 Lampet's Cafe, i. 214. 314 Lampley v. Blower, ii. 70 Lamplugh v. Brathwaite, i. 345 Lamplugh v. Lamplugh, 1. 201 Lamplugh v. Smith, i. 135 Lancashire v. Lancashire, ii. 65. 351 Lance v. Newman, i. 269 Lance v. Norman, i. 108 Lanfdown v. Lanfdown, i. 118. 111 Lane v. Dighton, ii. 119 Lane v. Pannell, ii. 135 Lane v. E. of Stanhope, ii. 331 Lanesborough v. Fox, ii. 59. 63. 66. Lanelborough's (Lady) Cafe, i. 109 Lanesborough v. Ockshott, i. 393 Langdon v. African Company, i. Langford v. Pitt, i. 218 Langford v. Tyler, i. 455 Langham v. Nenny, i. 317 Langley v. Baldwin, ii. 60 Langley v. Brown, 1. 117. 200 Langley v. Earl of Oxford, ii. 150 Lanoy v. Duke of Athol, i. 317. ii. Lasbrook v. Tyler, i. 108 Lassells v. Lord Cornwallis, i. 276. 326

Lavender v. Blackston, ii. 156 Laughter's Cafe, i. 221 Law v. Law, i. 225. 263 Lawrence v. Beverley, i. 420 Lawrence v. Blatchford, i. 437 Lawfon v. Hudson, ii. 288 Lawfon v. Lawfon, ii. 126 Lawson v. Stitch, ii. 362. 370 Leach v. Dean, i. 281 Leak v. Morrice, i. 186 Lechmere v. Earl of Carlifle, i. 346. 421. 424. ii. 192. 324 Lechmere v. Lechmere, ii. 120 Lecone v. Shiers, ii. 246 Ledfome v. Hickman, ii. 344 Lee v. Alston, i. 14. ii. 496 Lee v. De Arauda, ii. 324 Lee v. Lee, ii. 185 Lee v. Sir Robert Henley, i. 41 Lee v. Priaux, i. 107 Lee v. Withers, ii. 54 Leeds v. Powell, i. 135 Leeds v. Corporation of New Radnor, i. 155 Lees v. Lord Stafford, ii. 39 Legal v. Miller, i. 392 Legard v. Hodges, i. 154, ii. 39 Legatt v. Hockwood, i. 393 Legatt v. Sewell, i. 303. 364. 407. 11. 425 Legg v. Goldwire, i. 202 Leicester's (Earl of) Case, i. 436. ii. Leicester v. Foxcroft, i. 69 Leife v. Saltingstone, ii. 66 Leigh v. Barry, ii. 181 Leigh v. Brace, i. 453. ii. 50. 64 Leigh v. Thomas, i. 296 Lemaine v. Stanley, i. 192 Lemaitre v. Bannister, ii. 37 Leman v. Newnham, ii. 286, 287 Leneve v. Leneve, i. 25. ii. 153 Leonard v. Bacon, i. 278 Leonard v. Earl of Suffolk, i. 406. 408. 414 Lepipre v. Farr, i. 250 Lereux v. Naih, i. 359 Lefley's

Lesley's Cafe, ii. 187 Lethulier's Cafe, i. 249 Levatt v. Redham, ii. 118 Leving v. Caverley, ii. 270 Lewin v. Lewin, i. 290. ii. 372 Lewin v. Oakley, ii. 397 Lewis v. Chase, i. 267 Lewis v. Freke, ii. 437 Lewis v. King, ii. 326 Lewis v. Lewis, ii. 465 Lewis v. Nangle, ii. 287. 289 Lewis v. Rucker, i. 250, 251 Leyfield's Cafe, ii. 466 Like v. Beresford, i. 275 Lilcot v. Compton, ii. 339 Lilley v. Hedges, i. 294 Lillia v. Airey, i. 110 Limbery v. Mason, ii. 360 Lincoln's (Lord) Cafe, i. 274 Lindopp v. Eborall, i. 39 Lingard v. Earl of Derby, i. 447 Lingard v. Griffin, i. 414. ii. 470 Lingen v. Sauray, i. 420 Linfey v. Gibbon, i. 22 Linfey v. Talbott, ii. 457 Liste v. Gray, ii. 49. 73, 74 Lifter v. Lifter, i. 100. 314. 319 Littlebury v. Buckley, i. 201. ii. 127 Littlehales v. Gaicoigne, 11. 185 Lloyd v. Baldwin, ii. 148 Lloyd v. Collett, i. 392 Lloyd v. Carew, ii. 88.93. 96. 235. 242 Lloyd v. French, ii. 388 Lloyd v. Gregory, i. 142 Lloyd v. Reed, ii. 122 Lloyd v. Spillett, ii. 20. 26. 30. 116. 133 Lloyd v. Williams, ii. 424. 429 Lock v. Wright, i. 389, 399 Lockey v. Lockey, i. 159. 180. ii. Lockwood v. Ewer, ii. 260 Loft's Case, i. 317

London (Bishop of) v. Fytche, i. 231 London v. Nash, i. 355 London v. Richmond, i. 127. 131. 296 Long v. Beaumont, i. 430 Long v. Blackall, ii. 93. 96 Long v. Clopton, ii. 187 Long v. Dennis, i. 260. 252 Long v. Laming, ii. 74 Long v. Long, ii. 430 Long v. Short, ii. 294. 370 Longdale v. Longdale, i. 349. 406 Longford v. Eyre, i. 194 Longworthy v. Hockmore, i. 113 Lonfdale v. Church, ii. 427 Lowe v. Barron, i. 299 Lowe v. Davis, ii. 74 Lowe v. Peers, i. 152. 262. 264. Lowe v. Waller, i. 235. 242. ii. 490 Lowther v. Andover, i. 188 Lowther v. Carill, i. 176 Lowther v. Carlton, ii. 154 Lowther v. Condor, ii. 204 Lowther v. Stamper, i. 33 Lowthian v. Hazel, ii. 272. 372 Lucas v. Calcraft, i. 22 Lucas v. Comerford, i. 355 Lucas v. Lucas, i. 103 Luckner v. Freeman, i. 277 Lucy v. Moor, i. 76 Luddinton v. Kime, ii. 58. 90. 94 Ludlow, ex parte, i. 58, 59, 60 Lug v. Lug, ii. 351 Lutkins v. Leigh, ii. 294. 298 Luttrell's Cafe, i. 308 Lutwick v. Mitton, ii. 12 Lydiat v. Foach, ii. 219 Lyddick v. Weston, i. 190 Lyford v. Coward, i. 330 Lynch v. Cappy, ii. 184 Lyne, ex parte, i. 58 Lyne v. Willis, i. 82. ii. 269 Lyon v. Chandos, ii. 199 Lytton v. Lytton, i. 182

M

Macadam v. Logan, i. 326 Macaulay v. Phillips, i. 316 Macclesfield (Earl of) v. Fenton, ii. 434 Macdowell v. Halfpenny, i. 329 Machell v. Temple, i. 195 Machell v. Winter, ii. 366 Maclean v. Nash, i. 170 Mackarel v. Bachelor, i. 74 Mackenzie v. Robinson, ii. 257 Mackworth's (Sir H.) Case, i. 87 Maddison v. Andrews, ii. 198. 346 Maddox v. Wren, ii. 178 Magdalen Coll. Cafe, i. 277 Maire, ex parte, i. 83 Makepeace v. Fletcher, ii. 45. 50 Makeham v. Hooper, ii. 214 Malcolm v. Fullerton, i. 116. ii. 5 Malcolm v. Martin, ii. 442 Malden v. Merrill, i. 117 Malim v. Kighley, ii. 37 Mallabar v. Mallabar, i. 202. 422. ii. 127 Mallack v. Galton, i. 82. ii. 269 Malleverer v. Redshaw, i. 230 Mallory's Cafe, 1. 222 Man v. Cobb, i. 37 Manaton v. Squire, i. 20 Manby v. Scott, i. 98. 100 Manlove v. Ball, ii. 262 Man v. Ballett, ii. 177. 217 Manning, ex parte, i. 132. 371 Manning's Cafe, i. 213 Manning v. Herbert, ii. 203 Manning v. Napp, i. 78. ii. 311. 389 Manning v. Scott, ii. 260 Manning v. Spooner, ii. 292 Manfell v. Manfell, ii. 147. 174 Mansfield's Cafe, i. 52 Margrave v. Le Hooke, ii. 272 Marks v. Marks, i. 220. ii. 45 Marlborough (Duke of) v. Godolphin, i. 113

Marlborough (Duchess of) v. Strong, Marlow v. Pitfield, i. 73 Marlow v. Smith, i. 190 Marriott v. Hampton, i. 116 Marriott v. Marriott, i. 13. 69. ii. 310. 375 Marsh, ex parte, i. 269 Marsh v. Brace, i. 362 Marsh v. Lee, ii. 302. 304 Marsh v. Jones, i. 430 Marsh v. Marsh, ii. 108 Marsh v. Rainsford, i. 345 Marshfield v. Weston, ii. 460 Marston v. Gowan, i. 40 Martin v. Blythman, i. 345 Martin v. Kingsby, 1. 295 Martin v. Martin, ii. 407 Martin v. Rebow, ii. 126. 129 Marwin v. Cook, ii. 149 Masham v. Harding, ii. 397 Mason v. Abdy, i. 242 Mason v. Day, ii. 167 Mason v. Gardner, i. 25 Mason v. Mason, i. 89 Massenburgh v. Ash, i. 213. 403. ii. 96. 107 Masters v. Masters, i. 219. ii. 339. 476.478 Maffey v. Davis, ii. 185. 187 Massey v. Sherman, ii. 37 Masters v. Fuker, i. 266 Maston v. Willoughby, i. 398 Matthews v. Cartwright, i. 310. ii. 275 Matthews v. Hunbury, i. 227 Matthews v. Jones, i. 284 Matthews v. Lewis, i. 242 Matthews v. Newby, ii. 315. 415 Maundy v. Maundy, i. 68. ii. 317 Maw v. Harding, ii. 395 Maxwell v. Dulwich Col. i. 306 Maxwell v. Lady Montacute, i. 184. ii. 262 Maxwell v. Whittinghall, ii. 424. Maybank

V

N

N

M

M

M

M

M

M

M

M

Mi

Mi

Mi

 M_{il}

Mil

Mil

Mil

Mil

Mil

Mill

V

Maybank v. Brooks, i. 201 Mayett v. Mayett, ii. 370 Maynell v. Howard, ii. 278 Mayor of Galway v.. Ruffel, ii. 427 Mayor of York v. Sir Lionel Pilkinton, i. 6 Mead v. Lord Orrery, ii. 149. 152. Medina v. Stoughton, i. 120 Medley v. Martin, ii. 167 Meers v. Ansell, i. 200 Mellor v. Lees, ii. 262 Mellish v. De Costa, ii. 237. 245 Mellish v. Mellish, i. 118 Mendez v. Mendez, ii. 246 Mentney v. Petty, ii. 389. 394 Menzey v. Walker, ii. 198 Meredith v. Chute, i. 346 Meredith v. Wynn, i. 100. 319. 394 Merial v. Wymondfell, i. 296 Merry v. Abney, ii. 153 Mertins v. Joliffe, ii. 148. 151. 301 Mesgret v. Mesgret, i. 262 Metcalf v. Beckwith, i. 21 Metcalfe v. Metcalfe, i. 290 Meynell v. Howard, ii. 278. 287 Micklethwaite v. Boatman, i. 129. 11. 425 Middlecomb v. Marlow, i. 98. 274 Middleton's Cafe, ii. 376 Middleton v. Lord Kenyon, i. 279 Middleton v. Middleton, ii. 294 Middleton v. Onflow, i. 266 Middleton v. Spicer, ii. 129 Milboum v. Affignees of Simpson, ii. Milbourne v. Ewart, i. 102 Mildmay's Cafe, i. 298. ii. 26. 28, Mildmay v. Hungerford, i. 124 Mill v. Darrell, ii. 298 Millard's Cafe, i. 364. 11. 147 Miller v. Foster, ii. 466 Miller v. Lees, ii. 260 Miller v. Seagrave, ii. 69 Miller v. Warren, ii. 344. 364 Mills v. Banks, i. 447 Vol. II.

Mill's Cafe, ii. 380 Mills v. Eden, ii. 296 Milmay v. Hungerford, i. 116. 124 Milner v. Colmer, i. 96. 99 Milner v. Mills, i. 418. 420 Milner v. Milner, i. 117 Milnes v. Busk, i. 103. 107 Milton v. Edgworth, i. 392 Minuel v. Sarazine, ii. 327 Miscoe v. Powell, ii. 232 Mitchell v. Bower, ii. 430 Mitchell v. Harris, ii. 259 Mitchell v. Mitchell, i. 103 Mitchell v. Reynolds, i. 265 Mocatta v. Murgatroyd, i. 163. 232 Mogg v. Hodges, ii. 214 Moggridge v. Thackwell, ii. 216 Moneypenny v. Brown, i. 71 Monk v. Cooper, i. 375 Monkton v. Holmes, ii. 367 Montague v. Radcliffe, ii. 434 Montagu v. Tidcomb, i. 438 Montehori v. Montefiori, i. 66, 267 Moor v. Bennett, ii. 151. 300 Moor v. Hart, i. 190 Moore v. Freeman, i. 103 Moore v. Moore, i. 94. ii. 152. 329. Moore v. Parker, ii. 76. 91 Moore, Sir Richard, v. Lady Moore, 1. 94 Moorcroft v. Dowding, ii. 36 More v. May hew, ii. 30 Morgan v. Dillon, ii. 247 Morgan v. Gardner, ii. 203 Morgan v. Morgan, ii. 234 Morley v. Clewes, ii. 433 Morley v. Jones, ii. 41 Morley v. Morley, ii. 177 Morrow v. Bush, ii. 286 Morrett v. Palke, i. 320. ii. 187. 272.300 Morrice v. Bank of England, ii. 400, 401, 402. 407 Morrice v. Twining, 1. 124. 227 Nn Morris

Morris v. Burroughs, i. 290 Morris v. Le Gay, i. 407 Morris v. Lord Berkley, i. 32 Morris v. M'Cullock, i. 226 Morris v. Martin, i. 93 Morris v. Wilford, i. 442 Morrison v. Arbuthnot, i. 267 Morfe v. Buckworth, ii. 482 Morfe v. Wilson, i. 242 Mortimer v. Capper, i. 116. 1276 132. 295. 371 Mortimer v. Orchard, i. 185. ii. 472 Morton v. Lamb, i. 389 Mosely v. Virgin, i. 172 Moses v. Macferlane, i. 229. 374. 11. 5 Moss v. Gallimore, ii. 258. Mott v. Verney, i. 51 Moulson v. Moulson, ii. 325 Moyse v. Gyles, i. 103. ii. 102 Mudge v. Mudge, ii. 47 Mumma v. Mumma, ii. 122 Munday v. Munday, ii. 482 Munt v. Stokes, ii. 5 Murrel v. Cox, ii. 181 Mufgrave v. Dashwood, i. 292

N

Nabb v. Nabb, ii. 36
Nandick v. Wilkes, i. 404
Nanny v. Martin, i. 315
Napier, Sir John, v. Effingham, i. 82
Nash v. Edmonds, i. 170
Nash v. Lady Darby, i. 396
Nash v. Preston, ii. 255
Neale's Case, i. 58
Neale v. Attorney General, ii. 435
Nelson v. Oldfield, i. 70. ii. 316
Nelthorpe v. Hill, ii. 372
Netter v. Brett, ii. 376
Neville's Case, i. 298
Neville v. Johnson, ii. 462
Neville v. Neville, ii. 49, 50. 364

Neville v. Sanders, ii. 17 Neville v. Wilkinson, i. 229. 266. Newburgh v. Bickerstaff, i. 159 Newcastle, Duke of, v. Countess of Lincoln, ii. 82 Newcastle, Duchess of, v. Pelham, 11. 486 Newcomen v. Barkham, i. 428, 429, Newcomb v. Bonham, ii. 261 Newman v. Awling, ii. 425 Newman v. Barton, ii. 372 Newman v. Johnson, ii. 400 Newman v. Payne, i. 134 Newman v. Rogers, i. 392 Newport's Cafe, i. 279 Newsome v. Bowyer, i. 108. 114 Newstead w. Johnstone, ii. 128. 130 Newstead v. Searle, i. 269 Newton v. Bernardine, ii. 68 Newton v. Bennett, i. 284. ii. 184. 398 Newton v. Preston, ii. 119 Newton v. Rous, i. 372 Nichols v. Crisp, ii. 128 Nichols v. Danvers, i. 105 Nichols v. Gould, i. 27. 131 Nichols v. Judson, ii. 327 Nichols v. Leeson, i. 116. ii. 5 Nichols v. Maynard, i. 398 Nichols v. Osborn, ii. 339 Nichols v. Raynbred, i. 390 Nightingale v. Dodd, ii. 461 Nightingale v. Lawson, i. 386 Nixon v. Nixon, ii. 29 Noden v. Griffith, i. 436 Noel v. Attorney General, ii. 435 Noel v. Robinson, ii. 372 Noel v. Somerfet, ii. 247 Noel v. Wells, ii. 312. 316. 375 Norberry v. Yarbury, i. 20 Norfolk's, Duke of, Cafe, i. 212. 16. 80. 83. 93. 104 Norfolk v. Gifford, ii. 203 Normanby, Marquis of, v. Duchess of Devonshire, i. 176 Norris's

000000

0

0

0

Norris's Cafe, i. 144. 205 Norse v. Ludlowe, i. 20 North v. Champernon, i. 148. 303 North v. Compton, i. 442. ii. 53 North v. Langton, ii. 115 North v. Purdon, ii. 128 North v. Way, i. 148 Northcote v. Duke, i. 396, 397 Northey v. Burbage, ii. 363 Northey v. Strange, i. 287. ii. 343 Norton v. Fricker, i. 14. 158 Norton v. Simms, i. 225. 230 Norton v. Turville, i. 96. 108 Norwood v. Norwood, i. 260 Nott v. Hill, i. 135, 136. 141 Nott v. Smithies, i. 289 Nottingham v. Jennings, ii. 64 Nourse v. Finch, i. 202. ii. 131 Nourse v. Yarworth, ii. 106. 196 Nowlan v. Nelligan, ii. 37 Noy v. Ellis, ii. 283 Noyes v. Mordaunt, ii. 326 Nugent v. Gifford, ii. 149

Ord v. Blackett, ii. 237 Ord v. Hemmins, ii. 67 Ord v. Smith, i. 331. ii. 266 Orme v. Smith, ii. 362 Osborn v. Hosier, ii. 424 Ofmond v. Fitzroy, i. 63. 66. 134 Ofmyn v. Sheafe, i. 147. ii. 47 Offulton's (Lord) Cafe, i. 429 Ofwald v. Probert, i. 98 Otway v. Hudson, i. 304. 420. ii. Overbury v. Overbury, ii. 356 Overton v. Sydall, i. 362 Outread v. Round, i. 294 Owen v. Aprice, i. 14. 158 Owen v. Davis, i. 51. 180 Oxenden, ex parte, ii. 275 Oxenden v. Lord Compton, i. 54. 60. 421. ii. 167 Oxenden v. Oxenden, i. 94. 105 Oxford, Bishop of, v. Leighton, ii. Oxwick v. Plumer, ii. 302

0

Odil v. Tyrrell, i. 318 Odlin v. Samborne, ii. 187 Offley v. Best, ii. 384 Offley v. Jenny, ii. 235 Officy v. Offley, i. 103 Oglander v. Baston, i. 314, 315. 318 Ogle v. Cook, i. 196 Ognell's Cafe, i. 440 Oke v. Heath, i. 112. ii. 169. 364 Okeden v. Okeden, i. 447 Oldham v. Hughes, i. 311. 425 Oldham v. Lichfield, ii. 38 Olive v. Gwynne, ii. 466 Oliver v. Enfonne, i. 226 Omichund v. Barker, ii. 446 Oniel v. Mead, ii. 294 Onions v. Tryer, i. 199. ii. 361 Onflow v. South, ii. 366 Orly v. Trigg, i. 330. 392

16.

ess

P

Pack v. Bathurft, i. 326 Packer v. Wyndham, i. 97. 313. 316 Packman's Cafe, ii. 386 Paget v. Gee, i. 385 Paget v. Haywood, i. 260 Paget's Case, ii. 134 Palmer v. Jackson, ii. 266 Palmer v. Jones, ii. 175. 177 Palmer v. Mason, ii. 431 Palmer v. Scribb, ii. 37 Palmer v. Trevor, i. 114. ii. 430 Palmer v. Whettenhal, i. 160 Palmer v. Young, ii. 118 Palmes v. Danby, i. 88. ii. 112 Pamplin v. Galen, ii. 315 Papillon v. Voice, i. 406, 407 Paradine v. Jane, i. 375 Paramour v. Yardley, i. 451 Parke v. Wilson, ii. 36 Nnz Parker

Parker v. Ash, i. 331 Parker v. Dee, ii. 406. 494 Parker v. Gerard, i. 21 Parker v. Harvey, ii. 426 Parker v. Parker, i. 260 Parker v. Sarjeant, i. 169 Parkes v. Wilson, i. 152 Parrott v. Wells, i. 295 Parry v. Brown, i. 222 Parslowe v. Wheedon, i. 27 5 285 Parfon v. Lance, ii. 65. 351 Parsons v. Neville, i. 296 Parsons v. Thompson, i. 2. 126 Parteriche v. Pawlett, i. 102. 200. Partin's Cafe, ii. 376. 381 Partridge v. Goph, i. 282 Partridge v. Partridge, ii. 362. 371 Partridge v. Whiston, i. 232 Passey v. Freeman, i. 125. 163 Pate v. Horton, i. 290 Paterson's Case, i. 244 Patrick v. Harrison, i. 42 Pawlett v. Attorney General, ii. 104. 259 Pawlett's Cafe, ii. 362. 367, 368 Pawlett v. Delaval, i. 103 Pawlett v. Freake, ii. 378 Pawlett v. Pawlett, ii. 203 Pawfey v. Bowen, i. 223 Paufey v. Lowdall, i. 407 Pay's Cafe, ii. 93 Payne v. Collier, i. 441 Payton v. Bladwell, i. 266 Peachy, Sir Henry, v. Duke of Somerfet, i. 395, 396 Peacock v. Monk, i. 91. 95. 104. 107. 201. 313 Peacock v. Rhodes, i. 235 Peacock v. Spooner, ii. 79 Peale v. Ongley, i. 194 Pearley v. Smith, i. 385 Pearse v. Wyn, ii. 81, 82 Pearson v. Garnett, ii. 91 Pearfen v. Garrett, i. 344 Pearion v. Morgan, i. 162

Pearson v. Pully, ii. 264

Peafe v. Stileman, i. 276 Peck v. Parrott, 1. 214 Peckham v. Peckham. ii. 245. 248 Peel v. Capel, i. 231 Pells v. Brown, ii. 87, 88.97 Pelly v. Madden, ii. 117 Pember v. Mather, ii. 471 Pembroke, Earl of, v. Bowden, i. Pen v. Lord Baltimore, i. 34 Pendleton v. Grant, ii. 476 Pendock v. Macender, ii. 451 Pengal v. Rofs, i. 186. 189 Penhay v. Hurrell, ii. 137 Pennant's Cafe, i. 141 Penner v. Jemmett, i. 164 Peploe v. Swinburne, ii. 402 Perkins v. Bayntum, ii. 69. 102. 185 Perkins v. Mickelthwaite, ii. 344. 364 Perkins v. Walker, ii. 60 Perrin v. Blake, i. 403. 11, 71 Perrott's Cafe, 1, 52 Perrot v. Treby, ii. 175 Perry v. Marston, ii. 266 Perry v. White, ii. 64. 66 Peter v. Ruffell, i. 164 Peterborough, Earl of, v. Duchess of Norfolk, ii. 462 Peterborough, Earl of, v. Lord Mordaunt, ii. 465. Peters v. Opie, i. 389 Petit v. Smith, i. 201, ii. 127. 129. Petre v. Petre, ii. 232 Pett v. Pett, ii. 392. 395 Petty v. Slyward, ii. 103 Pewterers' Company v. Christ's Hofpital, ii. 82 Peyton v. Bury, i. 262. 266 Peyton v. Green, ii. 458 Philips v. Vaughan, ii. 188 Phillips v. Duke of Bucks, i. 30. 123. 327 Phillips v. Carew, i. 11

Phillips v. Chamberlayne, i. 118

Phillips v. Paget, i. 74

I

F

Phillips

Phillips v. Phillips, ii. 163 Philpot v. Hoare, i. 360 Phipard v. Mansfield, i. 450. ii. 56. Phipps v. Earl of Anglesey, i. 97. ii. 442 Pickering v. Keeling, i. 41. 349 Pickering v. Towers, ii. 64 Piddock v. Brown, ii. 461 Pidgeon's Cafe, i. 98 Pierce v. Parkes, ii. 389. 395 Piers v. Piers, i. 14. ii. 494 Pierse v. Warring, i. 262 Pierson v. Garnett, 11. 37, 38 Pierson v. Garrett, 1. 345 Pierfon v. Shore, i. 77. ii. 167 Pigot's Cafe, i. 66. 81. 260. ii. 382 Pigott v. Kniveton, i. 293 Pigott v. Morris, i. 260 Pigot v. Penrice, ii. 160 Pike v. White, i. 39. 351 Pilkington v. Shallow, i. 358 Pillans v. Van Muriop, ii. 342. 347 Pinbury v. Eikin, i. 214. ii. 68. 321. 367 Pincke v. Curtis, i. 392 Pitcairne v. Brace, i. 211 Pitcairne v. Ogbourn, i. 266 Pitt v. Hunt, i. 107. 313 Platt v. Heap, ii. 163 Platt v. Spriggs, ii. 174 Plowman v. Plowman, ii. 187 Plumb v. Carter, 1. 244. 254 Plumb v. Fluitt, i. 164. ii. 151 Plumb v. Beal, ii. 316 Plunket v. Holmes, ii. 163 Plunket v. Penfon, i. 284 Plunket v. Penton, ii. 398 Plymouth (Earl of) v. Hickman, ii. Pocock v. Lee, i. 102. 11. 289

Plymouth (Earl of) v. Hickman, 119 Pocock v. Lee, i. 102. ii. 289 Pockley v. Pockley, ii. 287. 291 Pocklington v. Baine, ii. 198 Pole v. Pole, ii. 122 Polexfen v. Moor, i. 153. 382 Pollard v. Lord Grenville, i. 323

S

Pomfret (Earl of) v. Lord Windfor, i. 320. ii. 464. 4 9 Ponfonby v. Adams, 1. 152 Poole's Cafe, ii. 82 Pooley v. Ray, i. 116 Pope v. Crashaw, i. 98 Pope v. Hazlewood, ii. 298 Pope v. Onflow, ii. 272 Pope v. Roots, i. 132. 294. 391 Pope v. St. Leger, i. 122 Popham v. Bamfield, i. 210. 259.400. Pordage v. Cole, i. 392 Porey v. Marsh, ii. 296 Porter v. Bradley, ii. 93 Porter v. Hubbart, ii. 434 Porter v. Phillips, i. 441 Porter's Cafe, ii. 215 Portland (Countess of) v. Prodgers, i. 108 Portland v. Willis, ii. 321. 330, 331 Portlington v. Eglinton, i. 66 Portington's (Mary) Case, i. 309. 312. ii. 82 Portman v. Willis, ii. 319. 330 Portmore v. Morris, i. 245 Potts v. Durrant, ii. 466 Potts v. Norton, ii. 230 Potter v. Pearson, i. 346 Potter v. Potter, i. 179, 180. 196. Poulson v. Willington, i. 269 Povey v. Brown, i. 98 Powell v. Ball, i. 99 Powell v. Cleave, ii. 230. 349 Powell v. Godfall, i. 329 Powell v. Hankey, i. 104. 330. 392 Powell v. Morgan, i. 400. ii. 164, 165 Powell v. Pillett, i. 390 Powell v. Powell, i. 301 Powell v. Price, i. 204. 406 Powis v. Corbett, ii. 272 Preston v. Executors of Wasey, i. Preston v. Tubbin, ii. 152. 154

Price v. De Burgh, ii. 189 Price v. Parker, ii. 386 Prideaux v. Gibbon, i. 218 Pridgem's Case, i. 102 Priest v. Parrot, i. 229 Priestley v. Wilkinson, i. 139 Prince and wife v. Green, ii. 28 Prince's Case, i. 83 Pring v. Pring, ii. 127 Prior v. Hill, i. 98 Proftor v. Cowper, ii. 266. 432 Proctor v. Oates, ii. 266 Prodgers v. Laugham, i. 275. 279 Prodgers v. Phrazier, i, 55. 62 Proof v. Hinis, i. 124. 246 Protector (The) v. Lord Lumley, ii. 481 Prouse v. Abingdon, ii. 202 Poliston v. Warburton, ii. 464 Pullir v. Ready, i. 107, 259, 260 Pultney v. Lord Darlington, i. 219. 424. 11. 325 Purefoy v. Purefoy, ii. 272 Purefoy v. Rogers, ii. 96 Purfer v. Snaplin, i. 118. ii. 369. 476 Purvis, ex parte, 1.95 Pufhman v. Filliter, ii. 37 Pufey v. Desbouverie, i. 289 Pufey v. Pufey, i. 31 Putterton v. Agnew, i. 209 Pybus v. Mitford, i. 434. ii. 22. 56. 71, 72. 135 Pybus v. Smith, i. 103 Pye v. Gorge, ii. 167 Pym v. Blackburn, i. 184 Pyke v. Williams, i. 180. 189

Q

Quadring v. Downes, ii. 239

R

Rachfield v. Careless, i. 202. ii. 128.
131
Radelisse v. Graves, ii. 184

Radford v. Wilson, i. 304 Radnor v. Rotherham, ii. 113 Rafter v. Stock, i. 38 Rakestraw v. Brewer, ii. 266 Ramiden v. Jackson, i. 201 Ramsden v. Langley, ii. 176 Rand v. Carthwright, i. 274. ii. 267 Randall v. Bookey, ii. 118. 129 Randall v. Head, ii, 483 Randall v, Paine, i. 259 Ranelagh v. Hayes, i. 42 Rann v. Hughes, i. 342 Raresby w. Newland, ii. 200. 201 Rashleigh v. Masters, i. 386. 421, 422. ii. 191, 192 Ratcliffe's Cafe, ii. 235. 237 Rattle v. Popham, i. 323 Raw v. Pole, i. 161. 166 Rawden v. Shadwell, i. 235 Rawley v. Holland, ii. 84. 137 Rawlins v. Powell, ii. 327 Rawstoner v. Bentley, i. 433 Ray v. Duke of Beaufort, i. 152 Raymond's Cafe, ii. 239 Raynor v. Mowbray, ii. 345 Read v. Brookman, i. 16 Read's Cafe, ii. 416, 417 Read v. Devaynes, ii. 381 Read v. Lichfield, ii. 286 Redman v. Redman, i. 266. 268 Reech v. Kennigal, i. 69. ii. 38. 323 Reeves v. Hearn, i. 259 Reresby v. Newland, ii. 200 Rex v. Cornforth, ii. 245, 248 Rex v. Crosby, ii. 451 Rex v. Davis, ii. 451 Rex v. Ford, ii. 451 Rex v. Inhabitants of Scammorden, 1. 122. 201 Rex v. Lady Portington, ii. 215 Rex v. Raines, ii. 380 Rex v. Stephens, i. 329 Rex v. Vincent, ii. 316 Reynish v. Martin, i. 259, 260 Rich v. Jackson, i. 123 Rich v. Rich, i. 287 Rich v. Sydenham, i. 67. 138 Rich

HHH

F

F

F

R

R

R

Rich v. Wilson, ii. 202 Richards v. Lord Bergavenny, ii. 69 Richards, qui tam, v. Brown, i. 242. Richardson v. Chapman, ii. 37 Richardson v. Elphinstone, ii. 327 Richardson v. Greese, ii. 202 Richardson v. Sydenham, i. 355 Richmond v. Morgan, ii. 324 Riddle v. Emerson, ii. 35. 38 Rider v. Wager, ii. 294. 362 Ridler, by committee, v. Ridler, i. 49. 56 Ridout v. Lewis, i. 104 Ridout v. Paine, i. 446. ii. 356 Ridout v. E. of Plymouth, i. 447 Rigden v. Valleire, ii. 50, 51. 56 Right v. Price, i. 199 Rightfon v. Overton, i. 260 Rippon v. Dowding, i. 112 Rivers (Earl of) v. Earl of Darby, ii. Rives v. Rives, i. 386 Rix v. Porkington, i. 277 Roach v. Garven, ii. 230. 232. 236, 237. 249 Roach v. Hammond, ii. 345 Roberdeau v. Rous, i. 34 Roberts v. Kuffin, i. 15 Roberts v. Dixwell, i. 407. 411 Roberts, ex parte, i. 65 Roberts v. Tremaine, i. 242. 253 Roberts v. Higham, ii. 343 Roberts v. Kingsby, i. 202. 204 Roberts v. Roberts, i. 266 Roberts v. Wynne, i. 69 Robertson v. St. John, i. 351 Robin's Cafe, ii. 382 Robinson v. Bell, i. 152 Robinson v. Bland, i. 235. ii. 439 Robinson v. Cumming, i. 148. ii. Robinson v. Davison, i. 320. 390 Robinson v. Gee, ii. 229. 300 Robinson v. Pett, ii. 175 Robinson v. Robinson, i. 449. ii. 58. 60, 61. 63

Robinson (Sir John) v. Cummins, ii. Robinson v. Taylor, ii. 118. 422 Robinson v. Tonge, ii. 409 Rochefter's (Bishop of) Case, i. 308 Rochford v. Earl of Ely, i. 55 Rock v. Layton, ii. 407 Rockingham v. Oxendon, i. 383 Rockwood v. Rockwood, i. 69 Roden v. Smith, ii. 364 Roe v. Collis, ii. 69 Roe, on demise of Noden, v. Griffith, i. 430 Roe, on demise of Parry, v. Hodgfon, ii. 247 Roe v. Popham, ii. 42 Roe v. Soley, ii. 272 Rogers v. Skillicorn, ii. 149 Rolfe v. Budder, i. 107 Rolfe v. Paterson, i. 152 Rook's Cafe, 1. 23 Rook v. Warth, ii. 167 Roper v. Radcliffe, ii. 359 Rose v. Bartlett, ii. 331 Roseberry v. Taylor, ii. 233 Ross v. Ross, i. 39. 301 Ross v. Ewer, i. 112 Rosser, exparte, 1.83 Rofwell v. Every, ii. 38 Roswell v. Vaughan, i. 120 Rothwell v. Huffey, ii. 464 Roundell v. Breary, i. 368 Routh v. Howell, ii. 176, 177 Rowden v. Malster, ii. 52. Rudyard v. Neirin, i. 100 Rundall v. Eeley, i. 407 Rushly v. Mansfield, i. 52. ii. 459 Ruffell v. Bodwill, i. 104 Russell v. Hammond, i. 271 Ruffell v. Ruffell, i. 186 Rutland (Duke of) v. Duchess of Rutland, i. 202. ii. 127. 131 Rutland's Cafe, ii. 42, 43 Rutland v. Molineux, i. 313 Ryal v. Rolle, i. 435. ii. 100. 329 Ryal v. Ryal, ii. 119 Ryan

Ryan v. Mackmath, 1. 42. 156. ii.
489
Ridout v. Pain, i. 451
Rydout v. Earl of Plymouth, i. 441

S

Sackwell v. Aylworth, i. 47 Sadler v. Hobbs, ii. 181 Saffyn's Cafe, ii. 12 Sagittary v. Hyde, i. 229. ii. 296 Saith v. Blanfry, 1. 314 Salmon v. Denham, 11. 54 Salter, ex parte, il. 232 Salterne v. Salterne, ii. 79. 319 Salwey v. Salwey, i. 100. 314 Salwin v. Thornton, i. 148 Samme's Cafe, ii. 45 Samon v. Jones, ii. 46 Samwell v. Wake, ii. 286 Sanders v. Drake, ii. 442 Sanders v. Neville, ii. 190 Sanders v. Ord, ii. 264 Sanderson v. Crouch, i. 99 Sanderson v. Marr, i. 76 Sandford v. Kerrington, ii. 457. 474 Sandys v. Duke of Athol, ii. 230 Sandys v. Sandys, ii. 199 Sarth v. Blanfry, i. 323 Sarum (Bp. of) v. Hofworthy, i. 353 Savage v. Forster, i. 76. 161. 180 Savage v. Taylor, i. 121. 130. 180. Savage v. Whitbread, i. 81

Saville v. Blackett, ii. 362
Saville v. Saville, i. 151
Saviour's (St.) v. Smith, i. 355
Saunders v. Dehew, ii. 148
Saunders v. Neville, ii. 194
Sawbridge v. Benon, ii. 404
Sawley v. Gower, i. 283
Sayer v. Gleen, i. 246. 253
Sayer v. Masterman, i. 407
Sayer v. Pierce, i. 14
Sayer v. Sayer, i. 219. ii. 372.

Sayle v. Freeland, i. 301. 303. 321. Scarborough (Mayor of) v. Butler, 1. 308 Scattergood v. Harrison, ii. 175 Scatterwood v. Edge, ii. 87. 91 Schoolding v. Green, ii. 346. 364 Scott v. Fenhoulet, ii. 105. 107 Scott v. Haughton, i. 90 Scott v. Tyler, i. 260 Scott v. Wray, i. 30 Scourfield v. Howes, ii. 181 Scriven v. Tapley, i. 96 Scroop v. Scroop, ii. 121, 122 Scrope's Cafe, ii. 160 Scudamore v. Scudamore, i. 421. ii. 193 Sculthorp v. Burgefe, ii. 30 Seagood v. Hone, ii. 51. 56 Seagood v. Meale, i. 186, 187. 190 Seale v. Seale, ii. 79 Sealing v. Crawley, i. 105 Seaman v. Bingham, i. 76 Searle v. Lane, 11. 402, 403 Searle v. Saint Eloy, ii. 291 Sears v. Hinde, i. 353 Segittary v. Hyde, i. 279. ii. 296 Sellock v. Harris, i. 184. 199. ii. 38 Selwey v. Selwey, i. 314. 319 Selwood v. Mildmay, ii. 369 Selwyn v. Selwyn, i. 214. 220. 446 Semphill v. Ballie, i. 260 Sergeson v. Sealey, i. 60 Sewell v. Muffon, i. 398 Seymour v. Fotherly, i. 117 Shaftsbury's Case, ii. 230 Shaftsbury v. Arrowsmith, ii. 485 Shaftsbury v. Hannum, ii. 246 Shailard v. Baker, ii. 54 Shales v. Shales, ii. 121 Shallcross v. Finden, ii. 400 Shapland v. Smith, i. 190. ii. 17 Sharpley v. Hurrell, i. 240. 253 Shaw v. Standish, i. 281 Sheffield v. Duke of Buckingham, 1. 70. 11. 316 Sheffield v. Lord Castleton, i. 41

S

SSS

S

S

S

S

S

S

S

S

S

S

S

S

S

S

S

Shelburn

Shelburn v. Earl of Inchinquin, i. Sheldon v. Drummond, ii. 153 Sheldon v. Lord Fortescue, i. 55 Shelly's Cafe, i. 418. 11. 34. 45. 70. Shelly v. Brewster, i. 331 Shepherd v. Becher, i. 438 Shepherd v. Shepherd, ii. 356 Sheppard v. Kent, ii. 400 Sherborn v. Clarke, i. 302. 11. 489 Sherer v. Bishop, ii. 343 Sheriff v. Wrotham, 1. 214 Sherman v. Collins, ii. 204 Sherman v. Sherman, i. 329 Shermin v. Collins, ii. 202 Sherrard v. Sherrard, i. 385 Shield v. Atkins, ii. 469 Shipton v. Hampson, i. 95 Shires v. Glaffcock, 1. 194 Shirley v. Lord Ferrars, i. 11, ii. 424, 425 Shirley v. Martin, i. 163. 264 Shirley v. Shatton, i. 122. 327 Shirley v. Watts, ii. 268. 481 Shode v. Parker, i. 398 Shore v. Billinsby, ii. 102 Shorer v. Shorer, 1. 420 Short v. Wood, i. 425 Shortridge v. Lamplugh, ii. 21. 133. Shove v. Pincke, ii. 48 Shave v. Webb, i. 372 Shudell v. Jekyll, ii. 349 Shute v. Malory, i. 160 Shute v. Shute, i. 93. 95 Shuttleworth v. Laywick, ii. 272 Sibley v. Cook, ii. 363 Sibthorpe v. Moxam, ii. 363. 365 Sidney v. Sidney, 1. 94 Silk v. Prime, i. 284. 11. 398 Silvefter v. Wilson, ii. 17 Silway v. Compton, i. 330 Simmons v. Cornelius, i. 186. 189 Simpson v. Turner, ii. 16, 17 Simpson v. Vaughan, i. 66. 118. Sims v. Urry, i. 38 Vol. II.

Singleton, ex parte, 11. 181 Singleton v. Singleton, ii. 346 Skelton v. Hawlins, il. 407 Slanning v. Style, i. 103 Slater v. Buck, i. 387 Slater v. Slater, ii. 55. Slaughter v. May, ii. 382 Sleech v. Thoringdon, i. 96. ii. Sleigh v. Metham, i. 147 Sloane v. Heathfield, ii. 494 Slocomb v. Glubb, i. 76 Sloman v. Walter, 1. 151. 397 Small v. Brackley, i. 138. 267 Small v. Fitzwilliam, i. 132. 152 Small v. Wing, i. 447 Smallcomb v. Crofs, ii. 404 Smally v. Smally, i. 73. 87 Smally v. Smally, i. 79 Smartle v. Williams, i. 279. ii. 466 Smee v. Martin, ii. 173 Smell v. Dee, ii. 430 Smith, ex parte, 1.83 Smith's Case, i. 49 Smith v. Ashton, i. 323, 324.350 Smith v. Aykwell, i. 266 Smith v. Baker, i. 39. ii. 117 Smith v. Bowin, i. 80 Smith v. Bromley, 267. ii. 6 Smith v. Bowen, i. 139 Smith v. Burows, i. 134 Smith v. Ld. Camelford, i. 104 Smith v. Carr, i. 48 Smith v. Burring, i. 140 Smith v. Evans, i. 193. ii. 119 Smith v. Guyon, ii. 148 Smith v. Haytwell, i. 42 Smith v. Law, i. 143 Smith v. Low, ii. 151. 301 Smith v. Maitland, i. 117 Smith v. Marshail, ii. 237 Smith v. Morris, 1. 211 Smith v. Oxenden, ii. 186 Smith v. Partridge, ii. 204 Smith v. Pemberton, ii. 434 Smith v. Shelberry, 1. 390 Smith v. Smith, i. 37. ii. 202. 239 00

Smith v. Stafford, i. 102 Smith v. Styles, ii. 401 Sneed v. Culpepper, i. 274 Sneed v. Sneed, i. 323 Snell v. Dee, ii. 368 Snelling v. Briggs, i. 344 Snelling v. Squint, ii. 147. 304 Snellfon v. Corbett, ii. 339 Snow v. Cutler, ii. 76. 91 Sockett v. Wray, i. 112 Somerville v. Chapman, ii. 218 Somerville v. Corkson, i. 31 Sonday's Cafe, ii. 68. 81 Sonley v. Masters, ii. 139 Sorrell v. Carpenter, ii. 152 Sonfby v. Hollins, ii. 213 South v. Allen, ii. 17 South Sea Company v. Bumpstead, 11. 492 Southby v. Stonehouse, i. 113. ii. 96. 486 Southcot v. Watson, ii. 129, 130 Southcot v. Stowell, i. 429. ii. 135 Southcote, ex parte, i. 60 Southcote v. Southcote, i. 329. ii. Sowden v. Sowden, ii. 120 Southcott's Cafe, ii. 178 Southwell v. Wade, i. 299. 308 Spalding v. Shalmer, ii. 149 Spalding v. Spalding, i. 147 Span v. Dewer, ii. 440 Sparkes v. Cator, ii. 325 Sparkes v. Smith, i. 357, 358 Speake v. Speake, i. 431. ii. 78 Spencer's Cafe, i. 355. ii. 342 . Spicer v. Haywood, i. 229 Spicer v. Spicer, ii. 54 Spink v. Lewis, i. 118. 422. 427. ii. 118 Spink v. Robins, ii. 327. 349 Spirt v. Bence, ii. 57 Spragge v. Stone, ii. 64. 351 Spratley v. Griffith, i. 127 Spring w. Bills, ii. 198 Spurrett v. Spiller, i. 267 .

Spurrier v. Mayofs, i. 244

Squib v. Wyn, ii. 987 Squire v. Baker, i. 327 Squire v. Dean, i. 104 Squire v, Pershall, i. 196. 334 St. John v. Turner, ii. 470 Stackpole v. Beaumont, ii. 230 Stafford v. Selby, ii. 267 Stafford v. Londen, i. 44. Stamford (Earl of) v. Hobart, 1. 407. 409. ii. 93 Stanford v. Marshall, i. 109 Staniforth v. Staniforth, ii. 199. 201. 205 Stanhope v. Topp, i. 351 Stanley v. Leigh, ii. 108 Stanton v. Sadler, ii. 304 Stanway v. Styles, 11. 227 Staples v. Maurice, ii. 102 Stapleton v. Cheales, ii. 364. 366. 372 Stapleton v. Colvill, ii. 285 Stapleton v. Conway, i. 241. ii. Stapleton v. Sherrard, i. 302. 480 Stapleton v. Stapleton, i. 82. 117. 11. 42 Starling v. Ettrick, 1. 429 Stebbin v. Walkey, i. 118. 427 Steed v. Berrier, i. 174 Steel v. Wright, i. 377 Stent v. Baillis, i. 13. 132. 370 Sturt v. Mellish, ii. 170 Stephens v. Bateman, i. 127 Stephens v. Brittedge, ii. 29 Stephens v. Dethwicke, ii. 200 Stephens v. Gerrard, ii. 460 Stephens v. Layton, ii. 26 Stephens v. Olive, i. 111, 112. 273 Stephens v. Savage, ii. 230 Stephens v. Snow, i. 442 Stephens v. Stephens, ii. 95. 108. Stephens v. Totty, i. 114 Stephenton v. Gardner, ii. 316 Stephenson v. Wilson, i. 157 Steward v. Bridges, i. 330 Stewart v. Bruce, ii. 102]

Stewart

Stewart v. Careless, i. 182 Stewart v. Denton, i. 186 Stewart v. Rumball, ii. 427 Stileman v. Ashdown, i. 272. ii. 121 Stiles v. Cowper, i. 141. 143 Stokes v. Stokes, i. 106 Stokes v. Mor, i. 177 Stone v. Grubham, i. 272. 297 Stone v. Lidderdale, i. 226 Stone v. Theed, i. 386 Stonehouse v. Evelyn, i. 192. 199. ii. 118. 429. 437 Story v. Lord Windfor, ii. 148. 494 Strange v. Harris, ii. 315. 389 Stratford (Earl of) v. Lord Wentworth, i. 382. 383 Strathmore v. Bowes, i. 107. 269 Stratton v. Best, ii. 51 Stratton v. Grymes, i. 260 Streatfield v. Streatfield, ii. 326 Stribblehill v. Brett, i. 268 Stribley v. Hawkie, i. 34 Strode v. Blackburn, ii. 488 Strode v. Falkland, i. 218 Strove v. Pincke, ii. 49 Stroud v. Marshall, i. 46. 49 Studholme v. Hodgson, ii. 108 Studholme v. Mandell, i. 221 Stukeley v. Butler, i. 174. 11. 39 Sturt v. Mellish, i. 329. ii. 170 Style v. Style, ii. 232 Sucklyer v. Morley, i. 234 Suffolk (Earl of) v. Green, i. 246 Supple v. Lawfon, 11. 345 Surry v. Sinalley, ii. 409 Sutton v. Jewks, i. 260 Sutton Coldfield v. Wilson, ii. 461 Sutton's Cafe, ii. 176 Swan v. Fonnereau, ii. 192 Swannock v. Lyford, ii. 112

Sweet v. Anderson, i. 211. 397

Sweetapple v. Bendon, 1. 420. 11. 99

Sweet v. Southcot, ii. 148

Sweetland v. Squire, ii. 424

Swithier v. Lewis, 11. 481

Sydney v. Sydney, i. 101

Sylvester v. Wilson, ii. 17

6.

11.

17.

273

108.

wart

Symes' Cafe, i. 317
Symes v. Vernon, i. 431
Symance v. Tattam, ii. 177
Symes et al. v. Symonds, i. 320
Symons v. Rutter, i, 421
Symondson v. Tweed, i. 179
Sympson v. Hornsby, i. 174
Sympson v. Turner, ii. 16, 17

T

Talbot v. Bradhill, ii. 260 Talbot (Duke of) v. Shrewsbury, 1, 323. 327 Taltarum's Cafe, i. 299. ii. 79 Tanard v. Potts, ii. 260 Tanfield v. Davenport, i. 99. 315 Tankerville (Earl of) v. Fawcett, ii. 288 Tanner v. Florence, i. 355. ii. 151 Tanner v. Soles, ii. 324 Tarback v. Morbury, i. 272 Target v. Gount, ii. 328 Targus v. Puget, i. 146. 442. 449 Tafburgh v. Echlin, ii. 262 Tate v. Austin, i. 102. ii. 289 Tate v. Hibbert, i. 289 Tatem v. Chaplin, i. 355 Tawney v. Crowther, i. 190] Tay v. Slaughter, ii. 210 Taylor v. Beech, i. 180 Taylor v. Bell, i. 233 Taylor v. Crompton, ii. 493 Taylor v. Dulwich College, ii. 219 Taylor v. Gorft, ii. 186 Taylor v. Bydell, ii. 91. 98 Taylor v. Shaw, ii. 82 Taylor v. Shum, i. 359 Taylor v. Taylor, ii. 121 Taylor v. Wheeler, i. 37. 40. 349 Taylour v. Rochford, i. 135. 141 Taylor v. Stibbert, ii. 151. 301 Teafdale v. Teafdale, i. 119. 162 Templeman v. Beake, i. 285 Tew v. Lord Winterton, i. 159. ii. 425. 427 002 Teynham

Teynham v. Lennarde, ii. 226 Theobald v. Duffey, i. 214. 219 Thetford School, Case of, ii. 220 Thetford's (Mayor of) Cafe, i. 307 Thirveton v. Collier, i. 292 Thomas v. Bennett, i. 109. ii. 327 Thomas v. Butler, ii. 382. 389 Thomas v. Gyles, i. 302 Thomas v. Hale, ii. 345 Thomas v. Howell, i. 400 Thomas v. Keymish, ii. 164 Thomas v. Porter, i. 396 Thomas v. Thomas, ii. 197 Thomas v. Williams, ii. 482 Thomlinson v. Dighton, ii. 53. 65. 66 Thomlinfon v. Smith, i. 188 Thomond (Earl of) v. Earl of Suffolk, i. 99. ii. 302 Thompson v. Atfield, i. 37. 349 Thompson v. Dow, ii. 203 Thompson v. Harcourt, i. 130 Thompson v. Harvey, i. 112 Thompson v. Leach, i. 48.50. 205 Thompson v. Noel, i. 390 Thompson v. Town, i. 276. 326 Thomson v. Freeston, ii. 156 Thorne v. Newman, i. 322 Thorne v. Thorne, ii. 47. 67. 16 Thorne v. Watkins, ii. 442 Thornborough v. Baker, i. 287. ii. Thornborough v. Whitacre, i. 209. Thorndike v. Wallington, i. 155 Thorpe v. Thorpe, i. 389, 390. 441 Thrale v. Ross, i. 226 Thrustout v. Coppin, i. 93. Thurman v. Abel, i. 372 Thurmain v. Cooper, i. 452 Thursby v. Plant, i. 362 Thynn v. Thynn, i. 69. 184. ii. 38 Tibbotts v. Hurft, ii. 53 Tiffin v. Tiffin, i. 287. ii. 114 Tilburgh v. Barbot, ii. 64 Tilly v. Bridges, i. 14. 158

Timewell v. Perkins, ii. 332 Tinney v. Tinney, i. 200 Tippin v. Cofin, ii. 76 Tipping v. Pigot, ii, 174 Tipping v. Tipping, 11. 294. 298 Tifdale v. Effex, i. 441 Titchburn v. Doddington, ii. 486. Todd v. Stokes, i. 98. 113 Tomkins v. Barnett, i. 245. ii. 6 Tomlinfon v. Smith, ii. 150 Tomlinfon v. Fleefton, ii. 157 Tollett v. Tollett, i. 322, 323, 324 Tomkins v. Barnett, 1. 244. 11. 6 Tomkins v. Ludbroke, i. 288 Tomkins v. Ennis, i. 281 Tooke v. Atkins, 1. 262 Tooke v. Hartley, ii. 277 Tooke v. Hastings, i. 217. 369 Toplis v. Baker, ii. 365 Topp v. Topp, i. 288 Tovey v. Pitcher, 1. 359 Tournay v. Tournay, ii. 203 Tourson's Cale, i. 55 Tourville v. Nash, i. 370. ii. 148. Towers v. Moor, 1. 200. 11. 472 Townley v. Sherborn, ii. 18 Towle v. Rand, i. 164 Townsend v. Ash, i. 14. 158 Townfend v. Ives, i. 196 Townsend v. Lawton, ii. 174 Townfend v. Windham, i. 104. 271. 276. 326. 347 Trafford v. Ashton, i. 447 Trafford v. Berridge, ii. 332. Trafford v. Bohen, i. 425 Trapp's Cafe, ii. 40 Trash v. White, ii. 266 Treacle v. Coke, i. 359 Tregame v. Fletcher, ii. 41. 43 Treves v. Townfend, ii. 185 Trevor v. Trevor, i. 404 Trimlestown v. Colt, ii. 437 Trix v. Quarterly, ii. 176 Trollop v. Trollop, ii. 69 Trott

Trott v. Vernon, ii. 400 Troughton v. Troughton, i. 326. ii. Trueman v. Fenton, 1. 345 Tucker v. Searle, i. 116 Tucker v. Wilson, ii. 260 Tuckfield v. Buller, i. 19 Tudor v. Anfon, i. 341. 11. 31. 123 Tudor v. Samyne, i. 107. 313 Tullit v. Tullit, i. 89 Tunstall v. Brachen, ii. 203 Turke v. Frencham, ii. 66 Turner v. Binnion, i. 347 Turner's Cafe, i. 313, 314. ii. 282 Turner v. Crifp, i. 333 Turner v. Jennings, i. 287. 289 Turner v. Richmond, i. 320 Turner's (Sir Edward) Cafe, i. 107.

Turner v. Trifby, i. 73
Turner v. Turner, i. 116
Turner v. Vaughan, i. 228
Turner v. Wation, i. 345
Turton v. Benfon, i. 269. ii. 491
Twaites v. Smith, ii. 319
Tweddall v. Tweddall, ii. 287, 288
Twifden v. Wife, i. 314
Twining v. Morrice, i. 124
Twifleton v. Griffith, i. 135, 136.

Twyne's Cafe, i. 272. 277. 279. ii.
27
Tylley v. Pierce, i. 102
Tyre v. Ball, i. 394
Tyte v. Willes, ii. 64

1.

ott

17

Vachell v. Jefferies, ii. 129 Vachell v. Vachell, ii. 319 Vaillant v. Dodomede, i. 360 Van v. Clark, ii. 202 Vanburgh v. Cock, i. 316, 317 Vane v. Lord Barnard, ii. 151. 153 Vane v. Fletcher, i. 199

Vaughan, on demise, Atkins v. Atkins, i. 436 Vaughan v. Burslem, ii. 82 Vaughan v. Farrer, ii. 208 Vaughan v. Thomas, i. 117. 131 Vernon's Cafe, ii. 25. 37. 100 Vernon, ex parte, 1, 83 Vernon v. Vandry, i. 15. ii. 167. Vernon v. Vernon, i. 88. 323. 369 Vezey v. Pinwell, i. 214. 219 Villers v. Beaumont, i. 274. 321 Villiers v. Villiers, ii. 105 Vincent v. Beverley, i. 155 Viner v. Francis, ii. 346 Vintner v. Pix, ii. 372 Virgin v. Moseley, i. 356 Voll v. Smith, i. 186

TI

Ughtred's Cafe, i. 390 Ulrich v. Litchfield, i. 118. ii. 40. 476 Upton v. Baffett, i. 277. 279 Urmstone v. Pate, i. 374 Utterson v. Mair, i. 42. ii. 481

W

Wade v. Paget, i. 323. 425
Wadham v. Marlow, i. 362
Wainwright v. Bendlowes, ii. 285, 286. 293
Wainwright v. Wainwright, ii. 328
Wakefield v. Child, i. 22. 158
Wagstaffe v. Wagstaffe, i. 199
Walcott v. Hall, ii. 371
Walker v. Burrows, i. 272. ii. 30
Walker's Case, i. 362. 382
Walker v. Bodington, ii. 147
Walker v. Denne, i. 421. ii. 192
Walker v. Gascoigne, i. 227
Walker v. Hale, i. 147. ii. 48
Walker v. Jackson, ii. 284

Walker v. Penry, ii. 442 Walker v. Perkins, i. 228 Walker v. Preswick, i. 153. 381 Walker v. Sanders, i. 314 Walker v. Smallwood, ii. 152 Walker v. Walker, ii. 262 Walker v. Witton, ii. 401 Walker v. Woollaston, ii. 382 Wall v. Thurboume, ii. 162. 197. Waller v. Child, ii. 216 Waller v. Dolt, i. 135. 140 Wallis v. Brightwell, ii. 442 Wallis v. Crimes, 1. 211 Wallis v. Everard, i. 22 Wallis v. Hodgson, ii. 391 Wallis v. Duke of Portland, ii. 492 Wallop v. Darby, i. 449 Wallop v. Darby, ii. 356 Walmsfey v. Booth, i. 134. 331. Walmsley v. Tanfield, i. 213. ii. 101 Walter v. Child, ii. 214 Walton v. Hobbs, ii. 472 Waltham v. Gray, ii. 357 Wankford v. Fotherly, i. 190 Wankford v. Wankford, i. 206. ii. 377, 378 War v. War, ii. 204 Warburton v. Warburton, i. 447. ii. Ward v. Dudley, ii. 287 Ward v. Lambert, ii. 32 Ward v. Lenthall, ii. 159 Ward v. Phillips, ii. 357 Ward v. St. Paul, ii. 245. 248 Ward v. Shallett, i. 274 Wardell v. Wardell, i. 40 Warden v. Elders, i. 153 Warman v. Seaman, ii. 70. 79 Warnford v. Warnford, i. 193 Warner, ex parte, i. 230 Warnham v. Browne, ii. 198 Warren v. Warren, ii. 324 Waring v. Danvers, ii. 408 Warrington, Earl of, v. Sir John Langham, i. 154

Warwick, Countels of, v. Edwards, 1. 104 Warwick v. Gerrard, ii. 28 Warwick v. Warwick, i. 204. 11. Washbourne v. Downs, ii. 80 Watkins v. Watkins, i. 95. 102 Watson v. Corbett, ii. 167 Watson v. Earl of Lincoln, ii. 34c Watson v. Hinsworth Hospital, i Watts v. Ball, i. 196. 403. 11. 90 Watts v. Brooks, i. 235. ii. 6 Watts v. Bullas, i. 350. 11. 32 Watts v. Creswell, i. 76. 161 Weale v. Lower, i. 301. 11. 468 Webb v. Clarke, i. 152 Webb v. Cleverdon, i. 70. ii. 317 Webb v. Herring, ii. 54.04 Webb v. Jones, ii. 286 Webb v. Ruffell, i. 354 Webb v. Webb, ii. 79. 102. 372 Webber v. Farmer, i. 267 Webster v. Alsop, ii. 298 Webster v. Webster, ii. 102 Weckett v. Roby, ii. 365 Wedgwood's Cafe, ii. 60 Weeks v. Gore, i. 351 Weeks v. Slade, i. 293 Weggs v. Villers, ii. 143, 144 Welby v. Thornagh, ii. 317 Welby v. Welby, ii. 470 Weldon v. Ducks, ii. 470 Weldon v. Elkinton, i. 451 Welford v. Beazeley, i. 178. 191 Weller v. Gascoigne, i. 226 Wellington v. M'Intosh, ii. 258 Wellington v. Wellington, i. 65. ii. 351 Wellock v. Hammond, ii. 54 Wells v. Wilfon, ii. 357 Welly v. Thornagh, i. 68. ii. 322 Wenman's (Lady) Cafe, i. 60 Wentworth's Cafe, i. 121 Wentworth v. Turner, i. 395 Wentworth v. Young, ii. 192 West v. Erissay, ii. 208 Weft

Whittingham v. Hall, i. 79. West v. Knight, ii. 208 Whittingham v. Thornborough, i. Western v. Cartwright, i. 329. 331 Western v. Wildey, i. 255 Whorewood v. Simpson, i. 121 Westfarling v. Westfarling, ii. 396, Whorewood v. Whorewood, 1. 104 Westley v. Clarke, ii. 182 Widlake v. Harding, i. 449 Widmore v. Woodroffe, ii. 216. 345 Wetlock v. Hammond, ii. 53 Wigg v. Wigg, ii. 148 Weyman v. Weyman, i. 269 Wilde's Case, 1. 192. 11. 69 Whaley v. Bagnall, i. 168. 182. Wilkes's Cafe, ii. 168 Wilkinson v. Brayfield, ii. 470 Whaley v. Norton, i. 228 Wilkinson v. Kitchen, i. 229. ii. 6 Whalley v. Whalley, ii. 117 Wilkinson v. Tranmer, 11. 48 Wharton v. Da Costa, ii. 258 Willett v. Cay, i. 107 Whately v. Kimp, i. 405 Willett v. Sandford, ii. 212 Wheale v. Lower, i. 300 Willett v. Winnell, il. 262 Wheeler v. Bingham, i. 260 Williams v. Duke of Bolton, i. 37. Wheeler v. Caryl, i. 274 436. ii. 48 Wheeler v. Sheers, ii. 127. 129 Williams v. Chitty, ii. 400 Whelpdale v. Cookson, ii. 187 Williams v. Callow, i. 105 Whistler v. Newman, i. 107. 109 Williams v. Fry, i. 90 Whistler v. Webster, ii. 326 Williams v. Harrison, 1. 79 Whitchurch v. Bevis, i. 168. 180 Williams v. Lambe, i. 22. ii. 147. Whitchurch v. Whitchurch, i. 82. 306.487 11. 105. 270 Williams v. Springfield, ii. 189 Whitchester v. Lawrence, ii. 168. Williams v. Steedman, i. 255 Williams v. Wray, ii. 112 White v. Collins, ii. 72 Williams v. Williams, i. 75 White v. Evans, ii. 127. 213 Willing v. Baine, ii. 102: 344. 364 White v. Ewer, ii. 264 Willett v. Cay, i. 96 White v. Hussey, i. 276. 284 Willis v. Turnegan, i. 126 White v. Nutt, i. 132. 371 Willis v. Shorrall, ii. 162 White v. Small, i. 65 Wills v. Palmer, 1. 429 White v. Stringer, 1. 280 Wills v. Strandling, i. 186 White v. West, i. 436 White v. White, i. 174. 386. ii. 60. Willoughby v. Willoughby, ii. 110. 114, 115 215, 216 Wilmer v. Kendrick, ii. 28 Whitfield, ex parte, 11. 225 Wilson v. Earl of Darlington, ii. Whiteleg v. Whiteleg, i. 30 Whitfield v. Fausset, i. 16 Wilson v. Fielding, i. 283. ii. 398 Whiting v. Wilkins, i. 33. 407 Wilson v. Harman, i. 385 Whithorn v. Harris, 16. 345 Wilson v. Pigott, ii. 324 Whitley v. Price, i. 135 Wilson v. Spencer, ii. 203 Whitmore v. Wild, i. 83 Wilson v. Lord J. Townshend, ii-Whitsley v. Earl of Scarborough, ii. Winchcome v. Hall, i. 333 Whittaker v. Whittaker, i. 219. Winchelsea v. Lord Norcliffe, i. 88

Winchester

Winchester, Bishop of, v. Beavor, Winchester, Bishop of, v. Knight, 1. 5. 14. 11. 494 Winchester, Bishop of, v. Fournier, Winchester's (Marquis of) Cafe, i. 70 Winchcombe v. Bishop of Winchester, i. 103 Wind v. Jekyll, i. 145. 214. 219. Windham v. Chetwynd, i. 196, 197 Windham v. Jennings, ii. 272 Windham v. Lord Richardson, ii. Wingfield v. Coome, ii. 195. 357 Wingfield v. Whaley, i. 331. 392 Winn v. Littleton, ii. 282 Winnington v. Foley, ii. 173 Wifeman v. Beake, i. 134, 135 Wiseman v. Carbonnell, ii. 277 Wiseman v. Roper, i. 348 Withread v. Brockhurst, i. 180. 186 Withnell v. Gartham, ii. 468 Witter v. Witter, ii. 167 Wolsten v. Aston, ii. 261 Wood v. Bates, i. 222 Wood v. Fenwick, i. 127. 131. 11. 291 Wood v. Ryland, ii. 92 Wood v. Watham, i. 103

Woodman v. Blake, i. 211. 396
Woodman v. Skute, i. 140
Woodroffe v. Winkworth, ii. 388
Woodward v. Giles, i. 152
Woolcombe v. Woolcombe, ii. 329.
332
Woolley v. Bishop of Exeter, i. 397
Woolleston v. Bishop of Lincoln, i.
435

Woodford v. Thellusson, ii. 93. 96

Woodhouse v. Hopkins, ii. 174 Woodhouse v. Shipley, i. 262. 264 Woodliffe v. Drury, ii. 29. 45 Woolnough v. Woolnough, i. 304 Woolrich's Case, i. 49. 56 Woolstoncroft v. Long, i. 283 Worfall v. Marlar, i. 98. 275. 11. Worsley v. Earl of Scarborough, ii. Wortley v. Birkhead, i. 321. ii. 301, 302. 304 Wray v. Williams, ii. 112 Wright v. Booth, i. 65. ii. 470 Wright v. Cadogan, i. 112. 310 Wright v. Holford, ii. 56 Wright v. Moor, i. 347 Wright v. Pearson, i. 407 Wright v. Pelling, ii. 300 Wright v. Row, ii. 221 Wright v. Rutter, i. 96 Wright v. Wright, i. 214, 215 Wrottesby v. Bendish, ii. 457 Wyne v. Hawkins, ii. 37 Wyth v. Blackman, ii. 108 Wytham v. Cawthorn, i. 97 Wywall v. Champion, i. 79

Y

Ad

Ad

Adr

Adv

Age

V

Yates v. Boem, i. 48, 49
Yates v. Fettiplace, ii. 202. 366. 368
Yea v. Bucknell, i. 188
Yelverston v. Yelverston, i. 216
Young v. Clarke, i. 30. 121. 131.
327
Young v. Peachy, ii. 118
York, Mayor of, v. Pilkington, i. 6

Z

Zouch v. Parsons, i. 77. 80. 84 Zouch v. Woolstan, r. 321. ii. 156.

GENERAL

[The Numerals refer to the Volumes, and the Figures to the Pages.]

BATEMENT-amongst legatees, ii. 369 Accident-when relieved in equity, i. 15. 156. 348 Account-when decreed in equity, i. 13 when not, i. 14. ii. 482 ftated-when opened, i. 14 of waste, 14 Mesne profits, 14 Dower, 22 Executor, how to account, ii. 414 Truftee, how to account, ii. 184 Mortgagee, how to account, ii. 304 Ademption-of legacy, ii. 353. 355

Administration-kinds of, ii. 382

when to be granted, ii. 383, 4 by whom to be granted, ii. 386. 388 to whom to be granted, ii. 387, 388 durante minori ætate, when determined, i. 23 revocation of-its effects, ii. 385, 386

Administrator-power of temporary administrator, ii. 382 durante minori ætate, his power, ii. 382

Advancement—of child, ii. 121 Agents-contracts by, 296. ii. 187 when liable, i. 296 notice to, ii. 153

Vol. II. Pp

L

Agreement

Agreement—decreed in specie, i. 28. 30. 149
though not equal, i. 126
though founded on mistake, i. 116
though void in law, i. 36. 101
though in part become impossible, i. 218, 219
though not performed by plaintist by day stipulated,
i. 392

nor to the whole extent of his part, i. 394 when not decreed—for want of confideration, i. 126,

127

because it would work a forseiture, i. 225
unreasonable, i. 129, 130. 327. 351
void in law, i. 222, 223
uncertain, i. 171
discharged afterwards, i. 392
damages be stipulated, i. 149,
not proceeded on for length of time, i. 392
obtained indirectly, i. 121, 130
not reduced into writing, i. 175
against the policy of the court, i. 134
made illegal by an act of parliament, i. 220
not mutual, i. 433
if plaintiff sail essentially in his part, i. 391

wnen fet aside as fraudulent and underhand, i. 267.
ii. 188, 189. 268

fpecific performance—in the discretion of the court,
i. 189

upon what terms decreed, i. 230 parol, when and when not decreed, i. 176. 184

A

A

B

B

how to be confirmed, i. 388
extended beyond provision of the parties, i. 372
in what manner to be executed, i. 388
counter agreements, i. 265
in fraud of marriage, i. 162. 266. 269
by tenants in tail, i. 301

See marriage agreements, infants, lunatics, baron and feme.

Alienation

Alienation-to uses, ii. 8, q Alienee-how affected by uses, ii. 8, 9 of feoffee without notice of uses or without confideration, ii. 147, 148 Alimony-when decreed in equity, i. 104 Annuity—when affected by inadequacy of confideration, i. 247 how conftrued, i. 248 when void for using, i. 244 Appointment-defectively executed, i. 323 subject to debts of party having a general power to appoint, i. 326 Apportionment-what may be apportioned, i. 384, 385, 386 what not, i. 387 Appurtenant-things appurtenant-when they pass, i. 454 Articles of fettlement-how conftrued, and when and when not allowed to control the fettlement, i. 202, 203. 407, 408 Affent-what effential, i. 45 when implied, i. 161. 205 Affets-what legal, ii. 397, 398 what equitable, ii. 398 term, when real and when personal affets, ii. 114 when and for whom marshalled, ii. 285, 286, 287 Affignment-covenants of leffee, when discharged by affignment, 1. 359, 360 what may be affigned, i. 212, 213, 214 to a beggar, i. 360. 362 Assignee-subject to what covenants of the lease assigned, i. 357 when liable to payment of rent after affignment, i. 359 Attorney-not to disclose in evidence what is professionally confided to him, ii. 457 contracting with his principal, i. 134. ii. 189 Auction-puffing, whether legal or illegal, i. 227

Bailment-kinds of, ii. 178
Bargain-losing-when decreed, i. 131
P p 2

Averment—when allowed to explain a deed, i. 200. ii. 468

d,

6,

92

20

67.

rt,

ed,

ion

Bargain

Bargain—catching—when fet aside, i. 140
Bargain and sale—its nature, ii. 12
when complete, i. 207. ii. 35
consideration of, ii. 32

how conftrued, ii. 48

Baron and feme—regarded as one person in law, i. 94
their capacity, how regarded in equity, i. 108
contracts interse, i. 101, 102

her acts during coverture with her husband, how far binding on her or on her husband, i. 91. 93.

113

acts of feme covert as executrix, i. 93
what act of the husband will bind the property of
the wife, and what not, i. 293. 309. 313
in what actions husband and wife must join, i. 309
when the wife may sue or be sued in equity without her husband, i. 94. 108

when to be confidered as feme fole, i. 109 term of the wife or her possibilities, when vested

in the husband, i. 313. 317

separate estate of the wife, how charged, protected, or disposable by her, i. 103. 107. 112

when and upon what terms the husband shall be aided for the portion of his wife, i. 95. 307 extent of wife's equity to a settlement, i. 95, 96, 97, 98

debts of wife when not chargeable on husband, i. 99 gifts between husband and wife, when good, when not, i. 102. 107

alimony, or feparate maintenance, when decreed to the wife, i. 100. 104

what property of the wife furvives to her, i. 313 agreement or covenant by husband to procure conveyance of wife's real estate, when and when not specifically decreed, i. 293, 294

conveyance by wife before marriage, when a fraud on subsequent marriage, i. 107. 108

Baron

Baron and feme—purchase by husband, when an advancement for his wife, ii. 125

wife when a creditor on her husband's estate, ii. 294

Baftard-how confidered in law, ii. 123, 124

Bill-effect of retaining, i. 155, 156

for discovery when and from whom it lies, ii. 480, et seq. of exchange—consideration of, i. 344

Blood-when a sufficient consideration to raise an use, ii. 27. 32

Bond-loft, i. 16

OW

93.

of

309

ith-

fted

ted.

be

96,

. 99

hen

d to

con-

not

raud

aron

3

obtained from a man when drunk, i. 67 upon legal confideration, i. 224 pro turpi caufâ, i. 227, 228 to procure a marriage, i. 261, 262 of refignation, i. 231 for money won at play, i. 233 voluntary bond binding on party, i. 347

voluntary bond binding on party, i. 347 in restraint of trade, i. 265

Bottomry bond—when aided in equity, i. 252, 253

Brocage—see marriage brocage, i. 140. 261. 268 see office brocage, i. 225

Building—covenant to build or rebuild or repair, i. 335. 358

Cafualties—involved in nature of contract, i. 132. 372 when relieved against, when not, i. 376, 377

Catching bargain-when fet aside, i. 140

Charity-visitation of, ii. 205

Charitable uses-commission of, ii. 207

what, ii. 207, 208 commissioners of, ii. 207

defective conveyance of, when aided, ii. 209

devise to, how it operates, ii. 210

how restrained, ii. 211

what may not be devised to, ii. 212, & feq.

what devise will be good, ii. 215

devise to, and object, not defined, ii. 215

object not in existence, ii. 216

devise to, executed cypres, ii. 217

Charitable

Charitable uses—trustees to, their power, ii. 218, 219
augmentation of fund, how surplus shall be applied, ii. 220, 221

Chattels-what will pass by such description, ii. 331

Children—who to take under general description of, ii. 346, 347 Chose in action—when assignable, i. 213

Compensation—upon partial failure in the performance of agreements, i. 392

forfeitures, when relieved against in equity, i. 395.

when decreed in damages, ii. 424

Composition of debts by executor, or trustee, or subsequent incumbrancer, ii. 187. 189

Concealment-when fraudulent, i. 162

Concurrent limitation-what, ii. 94

Conditional limitation—what, ii. 157 words of, ii. 80

Condition—breach of condition when aided, i. 398
precedent and subsequent, i. 259. 399

Condition-in restraint of marriage, i. 255

against law, i. 231

broken in circumstances, or becoming impossible by the act of God, i. 221. 400

when not relieved in equity, i. 221. 395. 400 when and where to be performed, i. 430

Confirmation—what agreements may be confirmed, and what not, i. 140, 141. 268

Confideration—when and when not requifite, i. 335
what a fufficient confideration, i. 345
failing before or after performance of agreement,
i. 132. 371
what a good and what a valuable confideration,

i. 271. ii. 27

See inadequacy of confideration—nudum pactum.
Conftruction—fee deeds, wills, covenants, trust

Contingent remainder-how it differs from an executory devise,

ii. 85

Contingent

C

Contingent remainder—how from a fpringing use, ii. 87

when it may be destroyed by tenant for life, ii. 90

Contract—foreign contract, how conftrued, ii. 438, 439 between parent and child, i. 134 attorney and client, i. 134

> with heirs, i. 134 failors, i. 135

Contribution—fee Appointment Conveyance—when aided

e

t,

t,

n,

c,

nt

if defective, i. 37
if intent of parties be mistaken, i. 116
when more is inferted than intended, i. 445
if deed be lost, i. 15

when not aided if voluntary, i. 348 if against an equal equity, i. 320 when avoided

if obtained indirectly, i. 123
if obtained from an heir without a full confideration, i. 133. 139
if fraudulent as against creditors or purchasers,

i. 270. 277 when not avoided

though made upon a false suggestion, i. 123
though unreasonable by matter ex post facto, i. 132
if sounded on mistake of all persons parties to it,
i. 117

upon what terms avoided, i. 140 Copyhold—defective furrender of, when supplied, i. 38 limitation of copyhold to uses, how construed, ii. 51

Copy-right—in books, i. 33
Corporation—by what contracts bound, i. 306
Covenants—what words fufficient to create a covenant, i. 146
when specifically decreed, i. 30. 35. 149. 294
Covenants

Covenants—when not specifically decreed, i. 167. 225. 298. 356.

fatisfaction of, ii. 333
when mutual, when independent, i. 389. 391
how conftrued, i. 145. 436
when a specific lien on lands, i. 367
when it will bind, after purchased land, i. 216, 217
breach of covenant, when restrained, when not, i. 151,

to repair, i. 355
to build, i. 355. 358
when collateral, i. 354
when it runs with the land, i. 355
who bound by, and who entitled to benefit of running
with the land, i. 355. 361
who bound by covenant collateral, i. 354

Covenant-to fland feized, ii. 47.

confideration of covenant, to fland feized, ii. 26, 27 bargain and fale, when so construed, ii. 48, 49

Courtesy—Tenant by, of trust estate, ii. 99 Custom of London—what, i. 286

frauds on custom of London relieved in equity,

i. 288

Damage—irreparable, how prevented in equity, i. 47

Damages—when equity will interpose, though damages be stipulated, i. 151

> when not, i. 166 how confidered in equity, ii. 423, 424

Decree—to what purpose, equal to a judgment at law, i. 316
to what purpose not equal to a judgment at law, ii. 407
how inforced, i. 41
when notice, ii. 153

Debts—in what order to be paid by executor, ii. 400 real estate when charged with debts, ii. 404, 405

Deed—when loft, relieved in equity, i. 15, 16
obtained from one in extremis, i. 71, 72
obtained by fraud or mifrepresentation, i. 121

Deed

Di

Di

Deed—when feveral are made at the same time, or construed as one entire conveyance, i. 436

deposit of deeds, i. 185

how construed, i. 426. 440. 445. 453

when controlled by averment of matter dehors, i. 230.

ii. 467

Deposit-what, ii. 1

of deeds, i. 185

Depositions-in equity, ii. 461

Devise-fraudulent, i. 282

how to be executed, i. 191

how construed, i. 426

when fee passes without word heirs, i. 442

when parol evidence admissible to explain, i. 201. 427

what passes by devise, i. 218

of estate contracted for, i. 218

of a poffibility, i. 219

for payment of debts,

in terrorem, i. 259

repugnant clauses, i. 450. 453

what words in a will, gives an estate in fee, i. 444. ii. 52,

53

what words in a will, gives an estate tail, ii. 67

of the fee by implication, i. 442. ii. 53, 54

of an estate tail, by implication, ii. 56, 57

when an estate will arise, be enlarged, controlled, or de-

stroyed by implication, and when not, ii. 56 to 67 to an infant in ventre sa mere, ii. 90

to children, generally how construed, ii. 345, 346

executory, see executory devise

to charitable uses, when good, when not, ii. 211. 213

when executed cy pres, ii. 216

Discovery—when for whom, and against whom, enforced inequity, ii. 479. et seq.

Discretion-how construed in equity, i. 23

when controlled, ii. 172. 197

Vol. II.

Qq

Distribution

Distribution—statute of, ii. 390 Discontinuance—not relieved against in equity, i. 302 Dividends—not apportionable, i. 386 Donatio causa mortis, what, i. 288 Dower—decreed in equity, i. 22. 157

arrears of dower decreed to representatives of dowress dying before her right established at law, i. 22 discovery of lands subject to dowers enforced against a purchaser, i. 22. ii. 147

Drunkenness, i. 67

Election—when allowed, as to money directed to be laid out in land, i. 122. 425. ii. 191, 192

of devisee claiming under, and against the will, ii. 325 Entry—whether necessary by trustees, ii. 145

Equity-what, i. 6.9

its jurisdiction, i. 10. 34
will not interpose if plaintiff will not do equity, i. 24.
128, 129

if his conduct be wrongful, i. 22.138
if the demand be unreasonable, i. 226. 327
against a statute, i. 20, 21. 24
against a general rule of law, i. 13. 22, 23
if plaintiff has an equally effective remedy at law,
i. 158, 159
if the demand be stale, i. 328

if the equity be equal, i. 321. 351
in general against stipulated damages, i. 152
will interpose to supply defects in circumstances, i. 35, 37
when there is no remedy at law, i. 158
when the legal remedy is fraudulently obstructed,
i. 159

against a penalty, i. 151. 395

confiders acts agreed to be done, as actually done, i. 419 estoppels, not favoured in equity, ii. 469.

Estate tail—what may be entailed, what not, i. 298
what may be limited in the nature of an entail, i. 299
what words will in a will create an estate tail, ii. 67

Estate

Estate tail—by implication, ii. 56, 57
qualities of, i. 299. ii. 81
trust, how alienable, i. 147. 293
fee tenant in tail

Estate pur auter vie, ii. 401

Estoppel-23. 470

n

d,

9

te

Evidence—of matter dehors the deed when admissible, i. 200
parol admitted to rebut an equity, i. 281. ii. 42. 131
parol agreements, part performed, i. 182, 183
of marriage agreements not admissible, i. 190
admissible to repel presumption, i. 330. 333
to explain latent ambiguities, i. 118. 427
to create a trust, ii. 120
general rules of, ii. 447
in equity what, ii. 448. 450. 461. et seq.

Exchange-by tenant in tail, i. 301

Excommunication-disqualification of a witness, ii. 452

Executor-office of, ii. 374

powers of, before probate, ii. 376
when bound to prove, ii. 382
effect of renunciation by, ii. 377
payment of debts by executor, in what order, ii. 396
how to account, ii. 411
alienation of term by, ii. 148, 149
when charged for acts of his companion, ii. 180
when, and when not entitled to furplus, ii. 127
when entitled to retain his own debt, ii. 402. 409
infant executor, i. 82. ii. 382
feme covert executrix, i. 93
de fon tort, ii. 416

Executory devise—what, ii. 85

how it differs from a contingent remainder, ii. 85
how it differs from a springing use, ii. 87. 91, 92
within what time it must take effect, ii. 94, 95

Qq2 Executory

Executory devise—whether capable of being destroyed, ii. 96 Expectancies—contracts for, i. 134

Feoffment—to uses, how it operates, ii. 20 when to use of feoffor, ii. 22

how it differs from covenant to fland seized, ii. 134

Feoffee-to uses, how affected in equity, ii. 8, 9

alienation by feoffee to uses, when good, when not, ii. 142

Fine-when complete, i. 173

by an idiot or lunatic, i. 52

by an infant, i. 83. 85

whether necessary to support a recovery by baron and seme,

Forfeiture—when relieved against in equity, 151. 395 Fraud—suppressio veri aut suggestio falsi, i. 123

shall not be presumed, i. 348

when relieved in equity, i. 13. 65, 66

when not, i. 13

in obtaining a will where and how relievable, i. 68. 70. 198

infant conusant of fraud, when bound, i. 76, 77

conveyances or gifts in fraud of creditors, i. 270. 276

conveyances in fraud of purchasers, i. 278

conveyances in fraud of marriage, i. 269

counter agreements when fraudulent, i. 265, 266

fraudulent devises, i. 282

party to a fraud not relievable in equity, i. 138

length of time not a bar to investigation of fraud, i. 331. Kelly v. Brewster, Rolls. T. T. 1795

species of fraud enumerated, i. 124

inadequacy of confideration when evidence of fraud, i. 127,

128

Freehold-in abeyance, ii. 84

Gaming-contracts and fecurities for money lost at play, i. 233,

234

contract for money lent at play, i. 234

Gifts-between husband and wife, i. 102

Gifts

I

I

I

I

L

Gifts-fraudulent, i. 276

in contemplation of marriage, i, 439

when perfect, i. 206

Goods—what passes by description of goods, ii. 328, 329

Guardian-kinds of, ii. 223. 235

in chivalry, ii. 236

prerogative of crown in matters of, ii. 223, 224

jurisdiction of Chancery, as to infants, how derived, ii.

224

its extent, ii. 229, 230

how appointed, ii. 235

what children subject to guardianship by nature, ii. 237

by nature, ii. 236

by foccage, ii. 239

by reason of nurture, ii. 243

power of, ii. 239

by will, ii. 239. 243, 244

who may appoint, ii. 245

to what children, ii. 245

who may be, ii. 245

how appointed, ii. 245, 246

when determined, ii. 246

effect of appointment, ii. 247. 248

duty of, ii. 249

Hearfay-when evidence, ii. 448

Heir-protected, and how, in equity, i. 133. 140

of the body, when a word of purchase, when of limitation,

ii. 70 to 78

Household stuff-what passes by description of, ii. 337

Idiot-i. 46. 62

8

property of an idiot vested in the crown, i. 53

Implication-estate by, i. 449. ii. 57

Inadequacy of confideration-when ground of relief in equity

when not, i. 126, 127. 129

Inclosures of land-when compelled by fuit in equity, i. 292

Infant

Infant—contracts by infants when void or voidable, and when not, i. 73, 74, 75, 76, 77. 80

marriage contracts of infants, when binding, when not, i. 74, 75

bound by decree, i. 81, 82

what acts infants may do, or be decreed to do, i. 83

infant executor, when bound, i. 83

infant truftee or mortgagee, i. 83

may execute a power over real estates, i. 84, 85

conusant of a fraud, i. 76, 77

levying a fine, i. 85. 87

bound to perform a condition, i. 89

estates of infants, how to be managed, i. 88

matters of record, when to be avoided by infants, i. 86, 87

Injunction-when necessary to account, i. 13

to restrain waste or nuisance, or printing books, &c.

when granted, i. 42

Infurance-how confidered, i. 246

Intention-in construction of deeds, i. 144

in construction of marriage articles, i. 200. 202. 405

in construction of will, i. 448

in creation of uses, ii. 44

in limitation of uses, ii. 49

, how to be collected, i. 426

how far to be enforced, i. 434. 440. 448

Interest-reason of allowing, ii. 419

when not allowed, ii. 424

on what debts allowed, ii. 424

from what time allowed, ii. 428

legacies, ii. 432

rate of, ii. 437

when allowed, though it exceed the penalty, ii. 426

when allowed on mortgages, when not, ii. 432

executor or truffee, when chargeable with, and what rate,

ii. 184, 185

on foreign contracts, ii. 438, 439. 442

Jointenant

k

I

I

L

L

Jointenant—furvivor when bound by agreement to make partition,
i. 371

Iffue—when word of purchase, when of limitation without leading iffue, when restrained to time of death, ii. 319

Jurisdiction-of courts of equity, i. 10. 23

affiftant to—concurrent with—and exclusive of courts of law, i. 10 when it operates merely in personam, i. 31. 33 how enforced in rem, i. 34 of chancery in matters of lunacy, i. 53

Justice-what, i. 1. 4

t,

t,

C.

nt

Kin—see next of kin
King—what matters belong to the king, as pater patriz, ii. 205

Land—when confidered as money, i. 419, 420 when, after purchased, will pass, i. 218

Law-what, i. 1

Lease and release-its nature, ii. 12

Legacy-may be fued for in chancery, ii. 314

if at law, ii. 405

fuit for a legacy in ecclefiastical court, when restrained, ii. 314

when implied, 333

when a fatisfaction of a debt, ii. 323, 324, 325. 327

when a performance of a covenant, ii. 324, 325

of goods, ii. 329

of chattels, ii. 330

of moveables, ii. 330, 331. 333. 335

of household stuff, ii. 337, 338, 339

how affected by error, ii. 340, 341

when generality of words of legacy restricted, ii. 344, 345, 346

ademption of express, what, ii. 348

implied, when, ii. 348, 349, 350

when adeemed by marriage alone, or by birth of a child only, ii, 350 to 361

Legacy

Legacy—how revoked, ii. 360, 361

of debts when adeemed by payment to testator, ii. 362
lapse of, what occasions, ii. 363. 368

what a vested legacy, ii. 366
specific, what, ii. 369

when to abate, ii. 370. 372

when to be refunded, ii. 371, 372

interest upon, ii. 432

Legatee—when to refund, ii. 371, 372 Length of time—when a legal bar, i. 328

when it furnishes a mere presumption, i. 329.331 equity of redemption when barred by a length of time, i. 332

mortgage, when prefumed to be fatisfied, i. 332. ii. 263, 264

no bar to investigation of fraud, or infanity of devifor, i. 333

presumption of legacy being paid, i. 331 when bar to suits, to inforce agreement, i. 391,

how to be taken advantage of in pleading, i. 278

Leffee—to what covenants liable after affignment, i. 362
whether liable to rent after destruction of premises by fire,

i. 374 under lesse, to what and how liable, i. 356 acceptance of assignee of the lessee, i. 362

Limitation of use—how construed, ii. 44. 49 concurrent, ii. 94, 95

Lis pendens—when notice, ii. 152 Livery of feizin—when supplied in equity, i. 37 Lunatic—who is, i. 46. 62

> who may traverse inquisition, i. 64 how protected, i. 56 acts of, when void, and when voidable in law, i. 48, 49,

> > 1

committees how appointed, i. 56
power of committee as to lunatic's estate, i. 59, 60
Lunatic

Lunatic—when to be produced, i. 60
trustee or mortgagee, how to convey, i. 61
jurisdiction of chancery in lunacy, how conferred, i. 54.
ii. 228

how exercised over lunatics abroad, i. 60 superfeding a commission, i. 65 when lunatic must be party to a suit, when not, i. 48. 56 marriage of lunatics, i. 61 maintenance of lunatics, i. 58

Marriage—agreements by parol in confideration of marriage, i. 190
fettlements on marriage varying from articles, when
rectified, i. 200, 201, 202
articles how expounded, i. 203
agreements in restraint of marriage, i. 255, 256
reason for restraining marriage between certain relatives;
ii. 392, 393

whether a revocation of a will of personalty, ii. 350
Marriage brocage—bond for procuring marriage when void, i. 259,
260. 263

Merger-what and how regarded in equity, ii. 162. 164

Mesne profits-account of mesne profits, when and when not decreed,

ii. 13. 142

from what time account of mesne profits to be taken, i. 158

interest on mesne profits, i. 158. ii. 424

Misrepresentation—effect of misrepresentation in equity, i. 123.

Mistake—when and when not relieved in equity, i. 115, 116. 119 when induced by fraud, i. 121

Money to be laid out in land-when confidered as land, i. 419,

when vested absolutely, i. 420. 425. ii. 195 will pass by description of goods, ii. 331, 332

Money had and received-action for, i. 218. 366

Vol. II. Rr Mortgage

Mortgage-its origin, ii. 252 how confidered in equity, ii. 255. 279 redemption of, ii. 255, 256 who may redeem, ii. 267, 268 upon what terms, ii. 272, 273, 276 equity of redemption when barred by length of time, i. 332 when prefumed to be fatisfied by length of time, i. affignable or divisable, i. 273 how it differs from a pawn, ii. 274, 275 parol evidence of, i. 277 payment of money to heir, when good, ii. 282, 283 when to be discharged out of personal estate, ii. 279, 280. 285, 286 when not, ii. 285, 286, 287 of wife's estate, how to be discharged, ii. 289, 290 buying in prior incumbrances. ii. 300 to 307

Mortgagee—first mortgagee, when and when not postponed in favour of the second, who holds the title deeds, i. 162,

fubsequent mortgagees how confidered in equity, ii. 302 when out of possession, when presumed to be satisfied, ii. 316

of a term how affected by covenants before possession, i. 351

estate of, ii. 257 his remedies, i. 292. ii. 268

Mortgagor—estate of, i. 527
infant how protected, ii. 269

Moveables-what will pass by description of, ii. 333, 334, 335

Next of kin—who, ii. 388. 391
refulting trust for, ii. 126
when entitled to administration, ii. 382, 389
Notice

Notice—of use or trust, ii. 143
what constructive, what not, ii. 150. 152
to affent or counsel, ii. 153
of prior incumbrance, ii. 301

Nudum pactum-what, i. 335

Nuisance-when restrained in equity, i. 31

Obligation—when relieved against, i. 123. 221. 227. 233. 237. 263, 264. 266

Occupancy, ii. 401

Office brocage—contracts entered into for procuring places or public offices, i. 225

Ordinary -power of ordinary in granting administration, ii. 383

Part-performance—what amounts to, i. 184, 185

Particeps criminis—whether intitled to recover back money on illegal contracts, i. 229. ii. 6

Partition—decreed in equity, i. 18 costs on partition, i. 21

Patents, i. 33

2

,

3

Penalty—in what cases equity will relieve against penalties, i. 151.

Perpetuity-what, i. 89, 90

how restrained, i. 89. 91

Portions-when to be raised on estates in reversion, ii. 199

double portions

when in life time of father, ii. 199

when fink for benefit of heir or devisee, and when not, ii. 202, 203, 204

Possessio fratris-of an use, ii. 98

Possibility—distinction between near and remote how regarded in equity, i. 212

when assignable in equity, i. 212

when not, i. 214

possibility descendible, i. 220

devisable, i. 219, 220

Rr 2

Power

Power—defective execution of, i. 40. 322, 323, 324
intention to execute, a power aided, i. 322. 324
execution of power prevented by fraud, i. 323
appointment in pursuance of power when subject to payment of debts, i. 276. 326
how construed i. 222

how conftrued, i. 321

Power of revocation—their nature, ii. 155. et feq. how construed, ii. 159 what good execution, ii. 161

Presumption—what affected by presumption arising from length of time, i. 328. 332

evidence admissible to repel prefumption, i. 331

Priority of time—how regarded in equity, i. 319 Purchaser—favoured in equity, i. 321

not favoured against a dowress, i. 22
what a valuable consideration, i. 271
what a fraudulent conveyance against a purchaser, i.
277. 279, 280
by agent, how affected by notice, ii. 153
for consideration without notice, ii. 146

when bound to fee to application of purchase money,
ii. 149, 150

when and when not bound to difcover, ii. 487

Quia timet-bill, i. 41. 43

Real estate—when charged with debts, ii. 404, 405 Receiver, i. 12

Recital—when and when not allowed to control the deed, i. 440

Recommendation—words of, ii. 38

Recovery—by ceftuy que trust, i. 147. 303

by baron and seme of wife's estate, i. 309

by infant, when to be avoided, i. 85, 86

operates as a confirmation of preceding incumbrances,

i. 444

not to be restrained, ii. 80, 81

Redemption

F

R

R

R

Re

Re

Re

Re

Sal

Set

Sh

Si

Redemption-equity of, fee mortgage.

Release-avoided for fraud, i. 123

extending beyond the intent, i. 440. ii. 104

Remainder-of a term, i. 213

cross remainders, when implied, i. 449. ii. 64 contingent, how it differs from a springing use, ii. 87, 88

how from an executory devise, ii. 97 when it becomes an executory devise, ii. 97

Register acts-how construed in equity, i. 25. 37

Rents—when to be recovered in equity, i. 353

affignee whether liable to rent after affignment, i. 359 mortgagee of a term, whether liable to rent before possession, i. 357

under-tenant how liable to rent, i. 356

lesse, when discharged from payment of rent, i. 362 whether rent be extinguished by destruction of premises,

i. 374 when due, i. 383

when apportioned, and when not, i. 383. 386

Rents and profits-account of, and when and when not decreed, i.

13. 157

charge on rents and profits, when sufficient to empower a sale of the land, i. 445, 447

Rent charge—when apportioned, though extinguished, i. 387

Refulting-truft, ii. 123

Revocation—implied, ii. 353

Respondentia-what, i. 252

Sale—when authorized by charge on rents and profits, i. 447
Satisfaction of debts by legacy, ii. 333
Settlements—on marriage, when varied, i. 146. 403. 405

Shelly's cafe—rule in, ii. 70, 71

Simony—bonds for refignation, when relieved against in equity, i. 231, 232

Specific

Specific performance—upon what principles, and when decreed in equity, i. 29, 30. 149
when not decreed in equity, i. 167. 171
in differentian of the court, i. 189

Springing use—what, and how barred, ii. 92 Statutes—how construed in equity, i. 24. 434 Statute of frauds—how construed, i. 25

respecting parol agreements, i. 176. 190 respecting wills of real estate, i. 191

Statute-of fraudulent conveyances, i. 270. 277

of uses, ii. 10 of distributions, ii. 392 of mortmain, ii. 214 of fraud, i. 164. ii. 36

Surrender—of a copyhold, when supplied in equity, i. 37 Survivorship—when and when not allowed in equity, ii. 102, 103

Tacking, 306. 314

Tenant in tail—how he may alien, i. 147. 301. 303

how he may bind his iffue, i. 301

Tenant—by courtefy of a truft, ii. 99

by dower not allowed of a truft, ii. 99

Term—property of wife when vested in the husband, i. 107. 313
remainder of, i. 213
trust of, how construed, ii. 101
to attend inheritance, ii. 104, 105. 111
in gross, ii. 106, 107
how it may be limited, ii. 107, 108
to raise portions when satisfied, ii. 111
when assets, ii. 113

Time-when material in a contract, i. 430

Tort, i. 4

Trust—creature of equity, i. 147
estate tail, when, and how alienable, i. 147, 148. 303
executed or executory, how construed, i. 406, 407

Truk

T

V

V

U

Ur

Uf

Trust—not affected by length of time, i. 331

what an estate in trust, ii. 16

when it results, ii. 116

when not, if purchased by father or grandsather, ii. 121,

122, 123

by husband, ii. 125

resulting for next of kin, ii. 126

resulting for heir, ii. 192

how revived, ii. 154

when not decreed in equity, ii. 187

Trust breach of—whether actionable, ii. 169

Trust breach of—whether actionable, 11. 169

Trustee power of—how and when controlled by cestuy que trust,
ii. 109, 110

Trustee—investing trust money in land, when a trust results, ii.

who may be, ii. 138

office and duty of, ii. 166

how he might prejudice his ceffuy que trust, ii. 166

may, and when, destroy contingent remainders, ii. 173

what he may do without suit, ii. 171

to what allowance entitled, ii. 175, 176

how charged for negligence, ii. 177, 178

how affected by acts of his co-trustee, ii. 180

when chargeable with interest, ii. 184

compounding debts, ii. 187

discretion of, ii. 197

of charities, ii. 217, 218

Turpis causa-contracts pro turpi causa, i. 227

ru &

Voluntary conveyance, i. 270. 277
Vo unteers—when and when not aided in equity, 348, 349
Unconfcionable bargain—when and how relieved, i. 133. 140. 243
Union of estates, ii. 72
Use—what, i. 363. ii. 7
origin of uses, ii. 2

Ufe

Use—modes of creating an use, ii. 15
creation of uses, how construed, ii. 44
limitation of uses, how construed, ii. 52
limitation of copyhold to uses, how constrained, ii. 51
springing uses, what, ii. 87
springing use, how it differs from executory devises, ii. 45.
88

how it differs from a contingent remainder, ii. 87, 88 within what time to arife, ii. 90, 91, 92, 93 refulting, when, ii. 132 when not, ii. 136 requisites to raise an use, ii. 138 who may be seized to an use, ii. 138 who is capable of an use, ii. 142 what wo s sufficient to raise an use, ii. 142 how revoked, ii. 155 charitable, ii. 205 superstitious, ii. 215

Usury—what, i. 237
how and upon what terms relieved against in equity, i. 24.
139. 140

Wager—when and when not legal, i. 236
Warranty—when implied, and when not, i. 119, 120. 372. 381
who bound by warranty, i. 365

Waste-when relieved in equity, i. 32 account of waste when decreed, i. 13

Weakness of understanding—deeds obtained from persons of weak understanding, i. 65. 68

Will—of personal estate when complete, i. 169
repugnant clauses, i. 450, 451
of real estate, how to be executed, i. 191
obtained by fraud, where relievable, i. 12. 68
how construed, i. 448
origin of, ii. 309

Will

Will—of personal estate, where anciently cognizable, ii. 310, 311 where now cognizable, ii. 313. 316 when construed by the civil and canon law, ii. 318 how expounded, ii. 322 when it speaks, ii. 342, 343 probate of, ii. 374

Witness, ii. 452
Words—fee intention.

45.

240

ak

ill

THE END.

ERRATA.

Vol. I. Page 63, line 27 of Note, for courts of equity read court of chancery. for man and woman read married woman. 109, Io read Cocket v. Wray, 4 Bro. 483. 112, 112, 5 115, last line, for condition read construction. for confined to read confirmed by. 143, 14 181, for entrenching read trenching. 219, laft line, for marriage read making the will. for affurance read appearance. 243, 9 for affignees read creditors. 274, 13 Tol. II. Page 6, line 27 for to excess read to the excess. for lender read borrower. for of the read or. 13, 10 26, for "This must be understood of fuch uses as do not," read " This must not be understood of fuch uses as do."

Vol. II.

Sf

LAW BOOKS

PUBLISHED BY

W. CLARKE and SON, Portugal-Street, Lincoln's-Inn.

BARTON'S Historical Treatise of a Suit in Equity; in which is attempted a scientistic Deduction of the Proceedings used on the Equity Sides of the Courts of Chancery and Exchequer, from the Commencement of the Suit to the Decree and Appeal; with occa-fional Remarks on their Import and Efficacy. Octavo, Price 6s. bound.

BOOTE'S Historical Treatise of an Action, or Suit at Law, and of the Proceedings used in the K. B. and C. P. The third Edition, 8vo. 6s. bound.

Anstruther's Reports of Cases argued and determined in the Court of Exchequer, from Easter Term 32 Geo. 3. to Trinity Term 37 Geo. 3. In three Volumes Royal Octavo, Price 11.85. 6d. in Boards, or 11.135. bound.

GF Part 1 and 2, of Vol. 3, may be had separate, to complete Sets, Price 5s. each.

Turner's Costs and Present Practice of the Court of Chancery, with Directions and Remarks for the Guidance of the Solicitor, in conducting of a Cause from the Commencement to its Close; and also in the conducting other Proceedings in Matters under the Jurisdiction of the Court, or of the Lord Chancellor, in a Manner entirely new. Comprehending the Proceedings before the Master, in all the Inquiries usually directed to him; particularly in the Appointment of a Receiver, Sales of Estates, Appointment of Guardians for Infants, their Maintenance. The Second Edition, to which is added, the Costs and Practice under a Commission of Lunacy, &c. &c. With an Appendix of Precedents. Quarto, Price 10s. 6d. Boards.

The Plan of this Work is entirely new. The Author has attempted to give a regular and connected Account of a Suit in Chancery, to describe its Progress, and the Manner of transacting the Practical Part of the Business. The Precedents of the Bills of Costs may be relied on, being taken from actual Business, and have undergone Taxation before the Master. It also contains many Parts of the Chancery Practice never before published, and forms a complete Guide in that Court.

WILSON'S Reports of Cases in the King's Bench and Common Pleas, from Hilary Term 16 Geo. 2. to Easter Term 14 Geo. 3. A new Edition, in three Volumes, Royal Octavo.

LAW BOOKS.

WILMOT'S Succinct View of the Law of Mortgages, with an Appendix of Precedents. Octavo, 5s. in Boards, 6s. bound.

BEVIL on Homicide and Larceny at Common Law. Offavo, 51. in Boards, 6s. bound.

SAUNDERS'S Reports, a new Edition, by Mr. Serj. WILLIAMS. Volume One, Royal Octavo, 18s. Boards.

ch is

the

n the

occa-

e 65.

nd of

ition,

n the

inity

. 6d.

Sets,

cery,

r, in

urif-

ren-

r, in Ap-

uar-

hich

acy,

i. 6d.

rs at-

ncery,

Part on,

before

never

mon

0. 3.

BIRD's New Pocket Conveyancer; or, Attorney's Complete Pocket Book. Containing a choice Selection, and great Variety, of the most valuable and approved Precedents in Conveyancing, relating to Agreements, Bonds, Leases, Mortgages, Powers of Attorney, Releases, Settlements, Wills, &c. &c. In which the modern Forms introduced by Conveyancers of the highest Eminence now in Practice are particularly attended to, and the Efficacy of them explained. To which are also added, Preliminary Observations relative to the Nature and Use of each particular Species of Deed, an Introductory Discourse on the Subject of Deeds in general, and conclusive Remarks on the Enurement and Construction of Deeds. In two neat Pocket Volumes, 9s. in Boards, 10s. 6d. bound.

BIRD's Affistant to the Practice of Conveyancing; containing Indexes or References to the feveral Deeds, Agreements, and other Assurances, comprised in the several Precedent Books of Authority now in Print. From the Time of Sir Orlando Bridgman to the present Period. With short Remarks on the distinguishing Qualities of each Precedent. In a Pocket Volume, Price 3s. 6d. bound.

CLERKE's Praxis Supremæ Curiæ Admiralitatis. 4s. 6d. bound.

HUNT'S Collection of Cases on the Annuity Act, with an Epitome of the Practice relating to the Enrolment of Memorials. The second Edition, considerably enlarged and improved, with many MS. Cases, to 35 Geo. 3. inclusive. In one Volume, Octavo, Price 75. bound.

HALE'S Pleas of the Crown. A new Edition, corrected, in two Volumes, Royal Octavo.

Showers's Reports of Cases in the K. B. with several learned Arguments. A new Edition, with Notes and References, by T. Leach, Esq. Barrister at Law. In two Volumes, Royal Octavo, 11. 4s. in Boards.

BACON on Leases and Terms of Years; with additional Notes by the Editor of the new Edition of Bacon's Abridgment. With a Selection of Precedents. Royal Octavo, 10s. 6d. bound.

LAW BOOKS.

HULLOCK's Law of Costs in Civil Actions and Criminal Proceedings. Wherein, amongst other Things, is particularly considered the Law relative to the Right of Plaintiff and Defendant to Cofts in Civil Actions; the Cofts to be recovered—On Amendments -Repleaders-Bringing Money into Court-Error-Replevin-On new Trials being granted, and for not proceeding to Trial—And in Actions by and against Executors. The Law is also stated as to the Taxing of Costs—The Liability of Attornies in certain Cases to pay them—And also the Lien that they possess on Deeds. &c. for their Fees. The extensive Collection of Cases contained in this Work, and the copious Manner in which the most important of them are reported, will, it is prefumed, be useful to the Profestion in general.—To the Attorney, by enabling him thereby to direct his Practice—To the Barrifter, by exhibiting in one Point of View, what otherwise could only be obtained by consulting a Number of different and often widely-scattered Authorities. In one large Volume, Oflavo, Price os. in Boards, 10s. 6d. bound.

NEWNAM'S Complete Conveyancer; or, The Theory and Practice of Conveyancing in all its Branches. The Practical Part confliting of Precedents of every Kind that the Practicers of the Law of every Denomination can possibly have occasion to consult in the Course of Business.

The Theoretical Part, confisting of the Law of Conveyancing, fully explaining the various Methods of acquiring, conveying, limiting, fettling, affigning, and forfeiting both real and personal Estates, and the Nature, Essect, and operative Qualities of the several Kinds of Fines, Recoveries, Deeds, and Common Assurances, and their Constituent Parts. The whole methodically arranged and scientifically treated, supported by the best Authorities, ancient and modern. In three large Folio Volumes, 3l. 10s. in Boards, 4l. 4s. bound.

Gentlemen are requested to complete their Sets as early as possible, there being only a few of the Numbers remaining. The SECOND and THIRD Volumes may be had separate, 11. 5s. each in boards.

Noy's Grounds and Maxims, and also an Analysis of the English Laws. To which is annexed a Treatise of Estates, by Sir J. Dodder R. Kit. and Observations on a Deed of Feossment, by T. H. Gent. A new Edition, being the fixth, with Notes and Additions, by C. Barton, Esq. In a Pocket Volume, Price 3s. 6d. bound.

LAWS respecting TITHES, by the Author of the Laws of Landlord and Tenant. In one Volume, Octavo, Price 2s. 6d. served.

W. CLARKE and Son have an extensive Collection of Books in Law, HISTORY, MISCELLANIES, &c. &c. both new and fecond-hand, a Catalogue of which may be had.

R. Noble, Printer, Great Shire-lane.